No. 02-626 Status: ARGUED
Title: South Florida Water Management District, Petitioner
v.
Miccosukee Tribe of Indians, et al.
Docketed: October 24, 2002
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (00-15703)
Decision Date: February 1, 2002
Rehearing Denied: June 21, 2002

| ~~~Date~~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Aug 29 2002 | Application (02A183) to extend the time to file a petition for a writ of certiorari from September 19, 2002 to October 21, 2002, submitted to Justice Kennedy. |
| Aug 29 2002 | Application (02A183) granted by Justice Kennedy extending the time to file until October 21, 2002. |
| Oct 21 2002 | Petition for writ of certiorari filed. (Response due November 25, 2002) |
| Nov 25 2002 | Motion for leave to file amicus brief filed by Pacific Legal Foundation. |
| Nov 25 2002 | Motion for leave to file amicus brief filed by Lake Worth Drainage District, et al. |
| Nov 25 2002 | Motion for leave to file amicus brief filed by Florida Fruit and Vegetable Association, et al. |
| Nov 25 2002 | Motion for leave to file amicus brief filed by National Water Resources Association, et al. |
| Nov 25 2002 | Motion for leave to file amicus brief filed by City of New York, et al.,. |
| Nov 25 2002 | Brief of respondent Miccosukee Tribe, et al. in opposition filed. |
| Dec 12 2002 | Reply of petitioner South FL Water Mgmt. filed. |
| Jan 13 2003 | The Solicitor General is invited to file a brief in this case expressing the views of the United States. |
| May 30 2003 | Brief amicus curiae of United States filed. |
| Jun 9 2003 | Supplemental brief of petitioner South FL Water Mgmt. filed. |
| Jun 27 2003 | Motion for leave to file amicus brief filed by Pacific Legal Foundation GRANTED. |
| Jun 27 2003 | Motion for leave to file amicus brief filed by City of New York, et al., GRANTED. |
| Jun 27 2003 | Motion for leave to file amicus brief filed by Florida Fruit and Vegetable Association, et al. GRANTED. |
| Jun 27 2003 | Motion for leave to file amicus brief filed by Lake Worth Drainage District, et al. GRANTED. |
| Jun 27 2003 | Motion for leave to file amicus brief filed by National Water Resources Association, et al. GRANTED. |
| Jun 27 2003 | Petition GRANTED. Limited to Question 1 presented by the Petition. |
| Jul 14 2003 | Extension of time to file the joint appendix and petitioner's brief on the merits to and including September 10, 2003. |
| Jul 14 2003 | Extension of time within which to file respondents' brief on the merits to and including November 14, 2003. |
| Sep 9 2003 | Brief amici curiae of Nationwide Public Projects Coalition, et al. filed. |
| Sep 10 2003 | Brief amicus curiae of United States filed. |
| Sep 10 2003 | Brief of petitioner South Florida Water Management District filed. |

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| Sep 10 2003 | Joint appendix filed. |
| Sep 10 2003 | Brief amici curiae of National Water Resources Association, et al. filed. |
| Sep 10 2003 | Brief amici curiae of National League of Cities, et al. filed. |
| Sep 10 2003 | Brief amicus curiae of City of Weston, FL filed. |
| Sep 10 2003 | Brief amicus curiae of Idaho Governor D. Kempthorne filed. |
| Sep 10 2003 | Brief amicus curiae of Pacific Legal Foundation filed. |
| Sep 10 2003 | Brief amici curiae of States of Colorado and New Mexico filed. |
| Sep 10 2003 | Brief amici curiae of Lake Worth Drainage District, et al. filed. |
| Sep 10 2003 | Brief amici curiae of Florida Fruit and Vegetable Association, et al. filed. |
| Sep 10 2003 | Motion for leave to file amicus brief filed by National Hydropower Association. |
| Sep 10 2003 | Brief amicus curiae of National Association of Home Builders filed. |
| Sep 10 2003 | Brief amicus curiae of Utility Water Act Group filed. |
| Sep 10 2003 | Brief amicus curiae of City of New York, et al. filed. |
| Sep 18 2003 | Letter of petitioner proposing a lodging. |
| Oct 6 2003 | Motion for leave to file amicus brief filed by National Hydropower Association GRANTED. |
| Nov 3 2003 | SET FOR ARGUMENT Wednesday, January 14, 2004. |
| Nov 4 2003 | CIRCULATED. |
| Nov 13 2003 | Brief amici curiae of Association of State Wetland Managers and Tropical Audubon Society filed. (Distributed) |
| Nov 13 2003 | Brief amici curiae of Trout Unlimited Inc., et al. filed. (Distributed) |
| Nov 14 2003 | Brief of respondent Friends of Everglades, Inc. filed. (Distributed). |
| Nov 14 2003 | Brief of respondent Miccosukee Tribe of Indians of Florida filed. (Distributed) |
| Nov 14 2003 | Brief amici curiae of New York, et al. filed. (Distributed) |
| Nov 14 2003 | Brief amici curiae of National Tribal Environmental Council, et al. filed. (Distributed) |
| Nov 14 2003 | Brief amicus curiae of Pennsylvania, Department of Environmental Protection filed. (Distributed) |
| Nov 14 2003 | Brief amici curiae of Tongue and Yellowstone River Irrigation District, et al. filed. (Distributed) |
| Nov 14 2003 | Brief amici curiae of National Wildlife Federation, et al. filed. (Distributed) |
| Nov 14 2003 | Brief amici curiae of Former Administrator Carol M. Browner, et al. filed. (Distributed) |
| Nov 14 2003 | Brief amici curiae of Florida Wildlife Federation, et al. filed. (Distributed) |
| Nov 14 2003 | Brief amici curiae of Coalition of Greater Minnesota Cities and City of St. Cloud, MN filed. (Distributed) |
| Nov 18 2003 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Nov 24 2003 | Record received from the U.S.C.A. - 11th Circuit (2 boxes) U.S.D.C. - Southern Dist. of Florida record included. |
| Nov 26 2003 | Motion for divided argument filed by respondent Friends of Everglades, Inc. |
| Dec 2 2003 | Opposition of respondent Miccosukee Tribe to Friends of the Everglades' motion for divided argument. |
| Dec 8 2003 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |

Docket for 02-626

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| Dec 15 2003 | Motion for divided argument filed by respondent DENIED. |
| Dec 19 2003 | Reply of petitioner South Florida Water Management District filed. (Distributed) |
| Jan 14 2004 | Argued. For petitioner: Timothy S. Bishop, Chicago, Ill.; and on behalf of the United States, as amicus curiae, Jeffrey P. Minear, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondents: Dexter W. Lehtinen, Miami, Fla. |

Supreme Court, U.S.
FILED

No. 02 626 OCT 21 2002

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The South Florida Water Management District (SFWMD) is the governmental agency that manages an extensive system of levees and canals throughout populous south Florida and the Everglades region. For decades it has pumped public waters to prevent catastrophic flooding and allocate water supply. For thirty years, the federal and state agencies responsible for the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program have considered the SFWMD's movement of water to fall outside the scope of the federal NPDES permit program because nothing is "added" to the navigable waters from the pumps. The Eleventh Circuit, in conflict with decisions from other courts of appeals and without deference to the agencies, concluded that because the pumped water contains some pollutants that would not reach the receiving water "but for" the pumping, such pumping alone constitutes an "addition" of pollutants requiring an NPDES permit.

The questions presented, which are of great national importance, are:

1. Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

2. Whether the court below should have deferred to the consistent and long-held federal and state agency position that the SFWMD's pumping does not constitute an "addition" that requires a National Pollutant Discharge Elimination System permit.

## RULES 29.6 AND 14.1 STATEMENT

Petitioner, South Florida Water Management District, is a governmental entity of the State of Florida created by Section 373.069(e), Florida Statutes.

Respondents are the Miccosukee Tribe of Indians of Florida, a federally recognized Indian tribe, and the Friends of the Everglades, Inc., a non-profit Florida corporation.



## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| RULES 29.6 AND 14.1 STATEMENT | ii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY AND REGULATORY PROVISIONS INVOLVED | 1 |
| STATEMENT | 1 |
| A. The Statutory And Regulatory Scheme | 5 |
| 1. Basic Elements Of The Federal NPDES Program | 5 |
| 2. State Regulation Of Pollution Caused By Hydrographic Modifications | 6 |
| 3. Delegation Of NPDES Administration To The State | 8 |
| B. SFWMD And Its Water Control Facilities | 8 |
| C. Regulatory Oversight And Permitting Of The S-9 Pump Station | 10 |
| D. Respondents' Citizen Suit Challenge To The S-9 And The District Court's Ruling | 12 |
| E. The Eleventh Circuit's Decision | 13 |
| REASONS FOR GRANTING THE PETITION | 14 |
| I. THE COURTS OF APPEALS ARE IN CONFLICT AS TO THE APPLICABILITY OF THE NPDES PROGRAM TO THE MOVEMENT OF WATER CONTAINING PRE-EXISTING POLLUTANTS | 14 |

TABLE OF CONTENTS – Continued


| | | Page |
|---|---|---|
| | A. EPA's Traditional "Addition" Test | 15 |
| | B. The Eleventh Circuit's Expansive "But For" Test | 16 |
| | C. The Conflict Is Deep And Should Be Immediately Resolved | 17 |
| II. | THE ELEVENTH CIRCUIT ERRED IN FINDING THE MOVEMENT OF WATER TO BE AN ADDITION OF POLLUTANTS FROM A POINT SOURCE SUBJECT TO THE NPDES | 18 |
| | A. The Plain Language Of The CWA Requires The Point Of Discharge To Be The Source From Which The Pollutants Originate | 18 |
| | B. The NPDES Program Was Intended To Regulate Only Those Point Sources From Which Pollutants Originate | 20 |
| | C. State Non-NPDES Programs Are The Appropriate Mechanism Under The CWA To Regulate State Water Management Activities | 21 |
| III. | THE COURT ERRED IN FAILING TO GIVE ANY CONSIDERATION, MUCH LESS DEFERENCE, TO THE CONSISTENT AND LONG-STANDING POSITION OF THE RESPONSIBLE FEDERAL AND STATE AGENCIES GIVEN THE COOPERATIVE FEDERALISM INTENDED BY THE CWA'S STATUTORY SCHEME | 24 |




TABLE OF CONTENTS – Continued


| | | Page |
|---|---|---|
| | A. The Eleventh Circuit Rejected EPA's Position On Improper Grounds | 26 |
| | B. Under The CWA's Statutory Scheme, Deference To The Implementing State Agencies Is Proper | 27 |
| IV. | THE PETITION SHOULD BE GRANTED, NOT HELD, FOR *BORDEN RANCH V. U.S. ARMY CORPS OF ENGINEERS* | 29 |
| | CONCLUSION | 30 |

## TABLE OF AUTHORITIES

Page

CASES:

*American Meat Inst. v. EPA*, 526 F.2d 442 (7th Cir. 1975).....25

*Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1975).....3, 13, 15, 20

*Arkansas v. Oklahoma EPA*, 503 U.S. 91 (1992).....4, 5, 27

*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).....27

*Attorney's Liability Assurance Society, Inc. v. Fitzgerald*, 174 F. Supp.2d 619 (W.D. Mich. 2001).....28

*Bellsouth Telecommunications, Inc. v. MCI Metro Access Trans. Ser., Inc.* 97 F. Supp.2d 1363 (N.D. Ga. 2000).....27

*Borden Ranch v. United States*, No. 01-1243 (2002)...29, 30

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001).....3, 14, 16, 17

*Dubois v. U.S. Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 1996).....3, 13, 14, 16, 17

*E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977).....25

*Environmental Protection Agency v. California ex rel State Water Resources Control Bd.*, 426 U.S. 200 (1976).....22

*Florida Wildlife Federation v. SFWMD*, Case No. 02-80918-Civ-Middlebrooks (S.D. Fla.) ..... 4

*Friends of Everglades v. SFWMD*, Case No. 02-80309-Civ-Middlebrooks (S.D. Fla.) ..... 4



## TABLE OF AUTHORITIES – Continued

Page

*Froebel v. Meyer*, 13 F. Supp.2d 843 (E.D. Wis. 1998).....29

*GTE South Inc. v. Morrision*, 199 F.2d 733 (4th Cir. 1999).....27

*International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).....5, 27

*Miccosukee Tribe v. South Florida Water Management District*, 721 So. 2d 389 (Fla. 3d Dist. Ct. App. 1998) .....12

*National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988).....*passim*

*National Wildlife Federation v. Gorsuch, Admin., U.S. Environmental Protection Agency*, 693 F.2d 156 (D.C. Cir. 1982).....*passim*

*Owasso Independent School Dist. v. Falvo*, 534 U.S. 426 (2002).....28

*Perry v. Downling*, 95 F.3d 231 (2d Cir. 1996).....27

*P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.C. 1975) .....20

*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).....24, 25

*Train v. NRDC*, 421 U.S. 60 (1975) .....25

*United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501 (11th Cir. 1985).....30

*United States v. Mead*, 533 U.S. 218 (2001).....24, 25

*United States v. South Florida Water Management District*, 28 F.3d 1563 (11th Cir. 1994).....11

*United States v. South Florida Water Management District*, 847 F. Supp. 1567 (S.D. Fla. 1992) .....11

TABLE OF AUTHORITIES – Continued

Page

*United States v. South Florida Water Management District*, Case No. 88-1886-Civ-Hoeveler (U.S. Dist. Ct. S.D. Fla).....11

*United States v. Sinclair Oil Co.*, 767 F. Supp. 200 (D. Mont. 1990) .....30

*US West Communications Inc. v. Public Serv. Comm of Utah*, 75 F. Supp.2d 1284 (D. Utah 1999).....27

STATUTES & REGULATIONS:

28 U.S.C. § 1254(1) ..... 1

33 U.S.C. § 407.....20

33 U.S.C. § 1251(a)(1).....20

33 U.S.C. § 1251(b) .....5, 8, 27

33 U.S.C. § 1251(g) .....5, 21

33 U.S.C. § 1288..... 6

33 U.S.C. § 1311 .....2, 18

33 U.S.C. § 1311(a)..... 5

33 U.S.C. § 1311(b).....22

33 U.S.C. § 1311(c).....22

33 U.S.C. § 1313(d) .....5, 6, 21

33 U.S.C. § 1313(e).....5, 6, 21

33 U.S.C. § 1314(f).....19

33 U.S.C. § 1314(f)(2)(F).....7, 19, 23, 26

33 U.S.C. § 1329.....5, 6, 21

33 U.S.C. § 1342.....5, 29



TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1342(b) ..... 8

33 U.S.C. § 1342(d) .....27

33 U.S.C. § 1344.....29, 30

33 U.S.C. § 1362(6) .....19

33 U.S.C. § 1362(12) .....2, 5, 18

33 U.S.C. § 1362(14) ..... 2

33 U.S.C. § 1362(16) ..... 5

33 U.S.C. § 1362(19) .....7, 19

40 C.F.R. § 122.2 ..... 5

§ 373.016, Fla. Stat. ..... 8

§ 373.069, Fla. Stat. ..... 8

§ 373.069(e), Fla. Stat. ..... 8

§ 373.073, Fla. Stat. ..... 8

§ 373.1501, Fla. Stat. ..... 9

§ 373.1501(1)(h), Fla. Stat. ..... 9

§ 373.1501(2), Fla. Stat. ..... 9

§ 373.4592, Fla. Stat. .....12

§ 373.4592(9)(k), Fla. Stat. .....12

§ 373.4592(9)(l), Fla. Stat. .....12

§ 373.4592(11), Fla. Stat .....12

§ 373.4595, Fla. Stat. ..... 9

§ 403.0885, Fla. Stat. ..... 8

Fla. Admin. Code, Ch. 62-620.200 ..... 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

EPA, *The Control of Pollution Caused by Hydrographic Modifications* (1973) ..... 7, 19

Flood Control Act of 1948 § 203, 62 Stat. 1176 ..... 9

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 109 (1971) ..... 7

1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the library of Congress), Ser. No. 93-1 ..... 7

3 Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act, Ser. No. 95-14 ..... 6

*National Pollutant Discharge Elimination System Memorandum of Agreement between the State of Florida and the United States Environmental Protection Agency* (1995) ..... 8

S. Rep. No. 370, 95th Cong., 1, Sess. 8-9, 1977 ..... 6

Water Resources Development Act of 1996, § 528, P.L. 104-303 ..... 9

Water Resource Development Act of 1996, § 528(b), P.L. 104-303 ..... 11

Water Resource Development Act of 1996, § 528(f), P.L. 104-303 ..... 11

Water Resource Development Act of 1996, § 528(f)(2), P.L. 104-303 ..... 11

Water Resources Development Act of 2000, Title VI, § 601, P.L 106-541 ..... 9



TABLE OF AUTHORITIES – Continued

Page

Water Resources Development Act of 2000, Title VI, § 601(b)(2)(C) ..... 10

WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. Ed. 1977) ..... 6, 19

P. WEISER, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L.Rev. 1 (Jan. 1999) ..... 27, 28

## PETITION FOR WRIT OF CERTIORARI

Petitioner South Florida Water Management District (SFWMD) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 280 F.3d 1364. The opinion of the district court (App., *infra*, 15a-30a) is unofficially reported at 1999 WL 33494862 and 49 ERC 2065. The district court's final summary judgment (App., *infra*, 31a-32a) is unreported. The court of appeals order denying rehearing and rehearing en banc (App., *infra*, 33a-34a) is unreported.

## JURISDICTION

The opinion of the court of appeals was entered on February 1, 2002. Petitioner's motion for rehearing and rehearing en banc was denied June 21, 2002. On August 29, 2002, Justice Kennedy extended the time for filing the petition for certiorari to and including October 21, 2002. App., *infra*, 35a-36a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions pertinent to this case are set forth at App., *infra*, 37a-42a.

## STATEMENT

The fundamental issue in this case is whether a state water management agency may pump water, to which it adds nothing, from one side of a levee to the other without the need for a federal National Pollutant Discharge

Elimination System ("NPDES") permit or, conversely, whether the Clean Water Act ("CWA") NPDES program reaches such traditionally local water management activities. To regulate local water management under the federal program designed to eliminate waste discharges fundamentally alters the CWA's statutory scheme.

A NPDES permit is required under the CWA only for those activities that add pollutants to the navigable waters from a point source.[1] See 33 U.S.C. §§ 1311 & 1362(12). The Eleventh Circuit, despite acknowledging that SFWMD does not increase the amount of pollutants in the navigable waters, concluded that because the pumped water contains some pollutants that would not reach the receiving water "but for" the pumping, the pumping constitutes an "addition" of pollutants to the navigable waters "from" a point source and, therefore, that the SFWMD must obtain a NPDES permit under the CWA.

The Eleventh Circuit's expansive interpretation of NPDES jurisdiction increases an already sharp conflict among the courts of appeals and ignores the position of the responsible federal and state agencies that no permit is required. The District of Columbia and Sixth Circuits adopted the position of the Environmental Protection Agency ("EPA") that an "addition" "from" a point source occurs only if the point source itself physically introduces a pollutant into the water from the outside world and that the transfer of pre-existing pollutants from one water body to another is not the "addition" of a pollutant to the receiving water body "from" the point source. *National Wildlife*

[1] A "point source" is broadly defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit * * * from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). This case involves the terms "addition" and "from" used by Congress to delineate the scope of NPDES. See 33 U.S.C. § 1362(12).



*Federation v. Consumers Power Company*, 862 F.2d 580, 581 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch, Admin.*, U.S. *Environmental Protection Agency*, 693 F.2d 156, 179 (D.C. Cir. 1982). The Fourth Circuit held that "those constituents occurring naturally in the waterway or occurring as the result of other industrial discharges do not constitute an addition of pollutants by a plant through which they pass," concluding that it is beyond EPA's authority to require a plant through which pre-existing pollutants pass to treat or reduce them. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1975).

The First and Second Circuits, in contrast, rejected the agencies' interpretation and found an "addition" in the transfer of pre-existing pollutants between wholly separate, naturally distinct water bodies despite nothing being added to the transferred waters. *Dubois v. U.S. Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 1996) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001). The Eleventh Circuit in this case further expanded the NPDES to regulate the states' management of surface waters within a naturally singular water body (separated only by manmade levees) by pumps from which no pollutants originate.

The Eleventh Circuit's ruling is legally erroneous. The notion that pumping water, without adding anything to the water being pumped, constitutes the "addition" of pollutants is inconsistent with the plain language, legislative history and purposes of the CWA. The Eleventh Circuit also erred in refusing to give any deference to the reasonable and longstanding interpretation of the "addition" requirement by the responsible agencies.

Given (1) the deep divide among the circuits, (2) the Eleventh Circuit's failure to acknowledge the consistent position of the federal and state agencies that are together responsible for implementing the CWA, (3) the critical role that states play in managing water throughout the nation,

and (4) the nationwide importance of effectuating the balance intended by the CWA between federal and state regulatory programs to resolve water quality and quantity issues, it is time for this Court to address the questions presented.

It is especially appropriate and necessary to review the extension of NPDES jurisdiction in this case. So expansive is the Eleventh Circuit's ruling that it is difficult to imagine any significant state or municipal surface water management system that would not require federal permitting. Congress did not intend to federalize regulation of local water management activities when it adopted the CWA. When it set out to eliminate industrial and municipal waste discharges into the nation's waters, Congress did not envision that the states' pumping of water from one side of a levee to the other – a traditional water management activity – would require a state to obtain a federal permit for the "discharge" of "pollutants" into the navigable waters from a "point source."

The situation here is particularly urgent. The subject pump station is but one of 391 water control structures and hundreds of miles of canals and levees that make the U.S. Army Corps of Engineer's Central & Southern Florida Flood Control Project (C&SFFCP) for which the SFWMD is the local sponsor. The unfounded application of NPDES permitting to the C&SFFCP threatens to impede local control of water management and land use decisions and to divert scarce resources from a joint federal and state eight billion-dollar, multi-agency effort to re-plumb the C&SFFCP project to restore the Florida Everglades and develop south Florida's water resources. Additional notices of intent to sue now threaten unprecedented litigation against eleven more pump stations. Two additional NPDES lawsuits have been filed against other C&SFFCP water control structures. See *Friends of Everglades v. SFWMD*, Case No. 02-80309-Civ-Middlebrooks (S.D. Fla.); *Florida Wildlife Federation v. SFWMD*, Case No. 02-80918-Civ-Middlebrooks (S.D. Fla.).



## A. The Statutory And Regulatory Scheme.

The CWA envisions a close regulatory partnership between the state and federal governments to restore and maintain the chemical, physical and biological integrity of the Nations' waters. *Arkansas v. Oklahoma EPA*, 503 U.S. 91, 101 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). In creating this scheme, Congress struck a careful balance among competing policies and interests. *Id*. The CWA relies heavily upon the states to maintain primary responsibility to prevent, reduce and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Environmental Protection Agency. 33 U.S.C. §§ 1251(b), 1313(d) & (e), and 1329. Congress did not want to interfere any more than necessary with state water management. 33 U.S.C. § 1251(g); *Gorsuch*, 693 F.2d at 178. Thus, CWA's cooperative federalism scheme was predicated upon the value of local input and experimentation. The issue is not whether the SFWMD can avoid regulation, but rather how the participating agencies regulate the pumping induced water quality changes at issue here within the framework of the CWA.

### 1. Basic Elements Of The Federal NPDES Permit Program.

Section 402 of the CWA created the NPDES program, which gives EPA regulatory authority to eliminate the discharge of industrial and municipal wastes into the nation's waters. See 33 U.S.C. § 1342; *Gorsuch*, 693 F.2d at 175. Section 301(a) of the CWA generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained a NPDES permit. 33 U.S.C. § 1311(a); *Arkansas*, 503 U.S. at 102.

A "discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) & (16); 40 C.F.R. § 122.2; Fla. Admin.

Code, Ch. 62-620.200. Thus, under the statute's plain text a NPDES permit is only required where there is an "addition" of a pollutant "from" a point source. To "add" is "to join or unite so as to increase the number, size, quantity, etc." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. Ed. 1977).

### 2. State Regulation Of Pollution Caused By Hydrographic Modifications.

Congress has left the regulation of nonpoint sources up to the states under Section 319. See 33 U.S.C. § 1329. Nonpoint source pollution is broadly defined by exclusion to be those water quality problems not subject to the Section 402 NPDES program. *Gorsuch,* 693 F.2d at 166.[2] The states are directed to take steps to address nonpoint source pollution, but left to determine for themselves the nature of those steps. 33 U.S.C. §§ 1313(d) & (e) & 1329.

> In 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through [the state] process * * * judging that those matters were appropriately left to the level of government closest to the sources of the problem.

S.Rep.No. 370, 95th Cong., 1, Sess. 8-9, 1977; reprinted 3 Legislative History of the Clean Water Act of 1977, A Continuation of the Legislature History of the Federal Water Pollution Control Act 642-43, Ser. No. 95-14; 1977 U.S. Code Cong. & Ad. News, 4326, 4334-35.

[2] Section 208 (33 U.S.C. § 1288) referred to in *Gorsuch* and the legislative history has been in practice succeeded by Section 319 (33 U.S.C. § 1329), both establishing the mechanisms through which the states are to establish processes to regulate nonpoint source pollution.



In the nonpoint source part of the CWA, Congress explicitly contemplates that pollution[3] caused by changes to the movement, flow or circulation of any navigable water, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities, will be controlled by the states under nonpoint source procedures and methods develop with guidance from EPA. 33 U.S.C. § 1314(f)(2)(F); See EPA, *The Control of Pollution Caused by Hydrographic Modifications* (1973); *Consumers Power*, 862 F.2d at 588. The legislative history confirms that Congress intended pollution caused by changes to the flow of water to be treated under nonpoint source programs:

> The committee . . . expects [EPA] to be most diligent in gathering and distribution of the guidelines for identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from *such nonpoint sources as . . . natural and man-made changes in the normal flow of surface and ground waters.*

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 109 (1971), reprinted 1 Legislative History of the Water Pollution Control Act Amendments of 1972 at 796 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1. (emphasis supplied).

[3] The term "pollution" as distinguished from a "pollutant" is more broadly defined to "mean the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Section 502(19), 33 U.S.C. § 1362(19)

### 3. Delegation Of NPDES Administration To The State.

The CWA contemplates that states will implement the NPDES permit program established under Section 402 of the CWA. 33 U.S.C. § 1251(b). Section 402 establishes the NPDES permitting regime, which provides for the states to administer the NPDES permit program for discharges into navigable waters within their jurisdiction. 33 U.S.C. § 1342(b). The Florida legislature, in turn, has expressly authorized its Department of Environmental Protection ("DEP") to assume responsibility for implementing the NPDES program in Florida. § 403.0885, Fla. Stat.

Pursuant to these statutes, EPA and DEP entered into a Memorandum of Agreement by which EPA has authorized DEP to implement the federal NPDES program in Florida. See *National Pollutant Discharge Elimination System Memorandum of Agreement between the State of Florida and the United States Environmental Protection Agency* (1995). The memorandum of agreement creates a close partnership under which DEP is given primary responsibility to establish the State NPDES program priorities which are consistent with national NPDES goals and objectives with oversight by EPA. *Id.*

## B. SFWMD And Its Water Control Facilities.

The SFWMD is one of five water management districts established to provide stewardship over Florida's public water resources. § 373.069, Fla. Stat. Under DEP's supervision the SFWMD's nine-member board establishes and implements the state's water policies throughout its 16 county jurisdiction from Orlando to Key West. See §§ 373.069(e), 373.073 & 373.016, Fla. Stat.

Florida's water management districts are drawn along hydrological, not political, lines to best manage water on a regional, watershed basis. § 373.069, Fla. Stat. SFWMD is responsible for the Lake Okeechobee watershed, an



immense, integrated and unique system of hydrologically connected lakes, rivers, bays and surface waters. See *Id.*; § 373.4595, Fla. Stat. Within this watershed lie populous municipalities, vast agricultural communities, and precious natural resources, including Florida's Everglades.

The watershed is managed by the U.S. Army Corps of Engineers' Central & Southern Florida Flood Control Project (C&SFFCP), for which the SFWMD is the local sponsor. § 373.1501, Fla. Stat. The C&SFFCP is a complex system of levees, canals, and flow diversion facilities used to control the movement, flow and circulation of water. The C&SFFCP was authorized by § 203 of the Flood Control Act of 1948 (62 Stat. 1176), in response to catastrophic loss of life and property following two major hurricanes in the late 1920's. Today the C&SFFCP is operated by the SFWMD, under Corps guidelines and regulatory schedules, to allocate a strained water supply and provide vital flood protection.

As local sponsor, the SFWMD is charged with implementing the federal government's ongoing comprehensive review ("Restudy") of the C&SFFCP to restore the Everglades ecosystem. § 373.1501(1)(h) & (2), Fla. Stat. The Restudy has evolved into the Comprehensive Everglades Restoration Plan ("CERP"), an eight billion-dollar joint federal and state effort to re-plumb the C&SFFCP to restore the everglades while accommodating the region's competing urban and agricultural interests. See *Water Resources Development Act of 1996 § 528, P.L. 104-303 ("WRDA '96"); WRDA 2000, Title VI, § 601 P.L. 106-541 ("WRDA '00").*

This case involves the S-9 pump station, which is one of 62 pump stations that move water through the canals and levees of the C&SFFCP. See App., *infra*, 2a. The S-9 is located at the juncture of the C-11 canal and the L-37 and L-33 levees. See *id.* at 3a. The L-37 levee extends north and the L-33 extends south from the S-9, creating an

impoundment area to the west known as Water Conservation Area 3A ("WCA 3A"). *Id.* The WCA 3A encompasses over 491,000 acres of historic Everglades. The S-9 moves water through the canal from east to west, one side of the levees to the other, to control quantities of water in the C-11 west basin. See *id.* The C-11 west basin is over 48,000 acres with a population over 135,000. As part of the Comprehensive Everglades Restoration, Congress authorized $225 million for two projects that address water quality problems resulting from the S-9 pumping, i.e., the WCA 3A/3B Levee Seepage Management project and the C-11 Impoundment and Stormwater Treatment Area. *WRDA '00*, § 601(b)(2)(C).

The SFWMD's structures, including S-9, add nothing to the waters they manage. App., *infra*, 3a. They are merely tools used to move water and determine the quantity of water in different parts of the system. Without the levee system, the managed waters would naturally flow together as a sheet across south Florida. App., *infra*, 3a n.2 & 8a n.8. The pre-existing pollutants within the managed waters are naturally occurring or were added from other sources upstream of the levees. *Id.* at 3a. The C&SFFCP is the primary water system which receives polluted waters from all other point and nonpoint sources throughout its jurisdiction. Most pollutants are received from the numerous municipalities, secondary drainage districts, and others that drain water into the larger C&SFFCP system.

### C. Regulatory Oversight And Permitting Of The S-9 Pump Station.

The C&SFFCP remains one of the most scrutinized water programs in the nation due to federal and state efforts to restore the Everglades while accommodating competing urban and agricultural needs. Through both litigation and legislation, the federal and state governments have jointly developed strategies and *non-NPDES*



permit programs for those C&SFFCP structures that impact the Everglades area, including the S-9 pumping to the WCA-3A.

In 1988, the federal government sued several Florida agencies to prevent polluted water from entering Everglades National Park and Loxahatchee Refuge through the C&SFFCP. *United States v. South Florida Water Management District*, Case No. 88-1886-Civ-Hoeveler (U.S. Dist. Ct. S.D. Fla) ("USA lawsuit"). The USA lawsuit was settled in 1992 by consent decree. *United States v. SFWMD*, 847 F. Supp. 1567 (S.D. Fla. 1992), rev'd on other grounds, 28 F.3d 1563 (11th Cir. 1994). The consent decree established an ambitious strategy to restore and preserve the Everglades ecosystem. 847 F. Supp. at 1569. It required strategies designed to bring water entering the Everglades and Loxahatchee refuge into compliance with applicable water quality standards, including the development of a permitting system for discharges into waters managed by the District. *Id.* EPA and other federal agencies approved the consent decree. *Id.* at 1577.

Also in 1993, the South Florida Ecosystem Restoration Task Force ("Task Force") was created by interagency agreement between the federal agencies, including EPA and the Corps, to oversee all aspects of Everglades restoration. By 1996, the Task Force was codified and expanded to include state, local and tribal representatives. WRDA '96 § 528(f). Task Force members include SFWMD, DEP and Respondent Miccosukee Tribe. *Id.* The Task Force oversees all activities of the C&SFFCP's Restudy and is specifically directed by Congress to develop a comprehensive plan to restore, preserve and protect the Everglades and its water quality. *Id.* § 528(b). The Task Force requires EPA to oversee the efforts of DEP and the SFWMD to improve water quality within the C&SFFCP, including of course S-9 and WCA-3A. *Id.* § 528(f)(2).

In 1994, the Florida legislature adopted the Everglades Forever Act ("EFA") to implement the Consent

phosphorus and other pollutants.[17] The Florida legislature has directed a distinct numeric criterion for phosphorus for the Everglades Protection Area, Section 373.4592(4)(e)(2), which is not directed for other waters such as the C-11 Canal. While the C-11 Basin may have been hydrologically connected to the Everglades Protection Area at some historic time, the C-11 Canal is man-made, dug out for drainage, and its surface waters do not flow into the upgradient receiving waters. While the C-11 Canal is a navigable water of the United States, its backpumping is not natural flow. Petitioner's backpumping, moreover, is causing long-term damage in the water quality of the receiving waters. *See, e.g.*, J. App. at 38-39, 135-36, 154-56, 164-69. The discharge of pollutants, including phosphorus at levels higher than those of the receiving waters, alters the quality of these waters and causes "pollution" as defined in the CWA. *Fidelity*, 325 F.3d at 1162 (citing *PUD No. 1*, 511 U.S. at 705). Altering the quality of the receiving waters, by backpumping polluted water into it, is not beneficial to those waters. It is also a clear example of an activity that requires an NPDES permit.

Finally, Section 101(g) directs federal agencies to develop water quality programs "in concert with" programs to manage water resources: "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert

17. Both the State and the EPA have formally determined pursuant to Section 303(d)(1)(A) that the WCA 3A is failing to meet its designated uses. *See* 33 U.S.C. § 1313(d)(1)(A). The Section 303(d) list identifies the water quality limited segments of every Florida water body. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Pumping massive quantities of polluted water into an already polluted section of the Everglades is irreconcilable with the CWA's requirement that pollution that impairs designated uses be eliminated.



with programs for managing water resources." If water supply transfers may be made without notice to, or review or regulation by, State NPDES permit-writers, then water management programs can override NPDES programs, contrary to Section 101(g)'s explicit directive that the two types of programs operate "in concert." *See, e.g., PUD No. 1*, 511 U.S. at 704 (explaining the distinct roles of the federal and state governments and referring to state water quality standards as providing a supplementary basis "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.") (citing *California*, 426 U.S. at 205).

### D. The Rule Of Lenity Has No Application Here

Petitioner's argument that the criminal penalties of 33 U.S.C. §§ 1319(c)(1) and (2) require the CWA to be strictly construed is mistaken. The Petitioner cites two cases in which this Court has applied the rule of lenity in "a civil setting." However, in both cases the United States government was a party seeking the civil application of a statute which had "criminal applications that carried no additional requirement of willfulness." *See, e.g., United States v. Thompson/Center Arms Company*, 504 U.S. 505, 517-18 (1992) (criminal tax statute); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (criminal statute prohibiting private compensation for government employees). This civil suit was brought by private parties under the CWA, which carries criminal penalties but only if the requisite scienter requirements are met. *Compare* 33 U.S.C. § 1319(d) (strict liability for civil claims) *with* 33 U.S.C. § 1319(c) (criminal penalties for negligent or knowing violations). Thus, there is no precedent or basis for applying the rule of lenity in this context.

Even assuming the rule of lenity could apply in this civil suit, it "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994). The rule could have no application here because the plain language, purpose, structure and history of the Act unambiguously show that a permit is required for the discharge of pollutants from the S-9 point source.

## III. REQUIRING AN NPDES PERMIT FOR THE S-9 STRUCTURE PROMOTES FEDERALISM AND DOES NOT CREATE AN UNDUE BURDEN UPON WATER SUPPLY DISTRICTS OR EVERGLADES RESTORATION

A proper federalism balance is fully maintained by implementing the plain meaning of the CWA; and the principles of this case do not create an undue burden upon water supply districts or the Everglades restoration project.

### A. The CWA's Permit Requirements in This Case Are Consistent with Principles of Federalism and Do Not Interfere with "Traditional Powers" of the States

Enforcement of the CWA's NPDES permit provisions does not raise any federalism concerns because the provisions of the statute carefully balance these two interests. *See PUD No. 1*, 511 U.S. at 704 (the CWA establishes distinct roles: EPA is required, among other things, to establish and enforce technology-based limitations on "individual discharges" into the country's navigable waters from point sources, and the states are required, subject to federal approval, to establish



comprehensive water quality standards). The permitting program provides a regulatory partnership between the state and federal government, *see Ouellette*, 479 U.S. at 490, and recognizes the important role of the states, but requires federal supervision as a result of the states' prior failures at self-regulation. *See* 118 Cong. Rec. 10,203, 10,251 (1972).

What Petitioner is requesting from this Court is to interfere with that careful balance, distort the plain meaning of the definitions and create new exemptions. Although NPDES permits contain restrictions on discharges under the provisions of the CWA, the state decides in the first instance the contents of these restrictions. *See* 33 U.S.C. § 1342(a); 40 C.F.R. § 122.44(a). Permits allow discharges and do not prevent Petitioner from continuing to develop a comprehensive plan for water management. Nothing in any of the federal acts cited by Petitioner displaces the clear requirements of the CWA. Indeed, they expressly require compliance with any applicable federal law. *See* WRDA 2000 § 601(i)(3) ("Nothing in the agreement established under this subsection shall alter or amend any existing federal or state law, or the responsibility of any party to the agreement to comply with any federal or state law."); WRDA 1996 § 528(b)(4)(B) (requiring compliance with "any applicable federal law"). Nor would a single state permit, which is not subject to EPA oversight, substitute for the NPDES permit requirements of the CWA. If an NPDES permit is required, that is the type of permit that must be obtained.

Moreover, Petitioner's exaggerated claims that this case will violate existing federalism arrangements if an NPDES permit is required for the S-9 pump station is contradicted by the fact that the major components of Everglades restoration in the Everglades Construction Project are already

under the NPDES permitting program. EPA first required Florida to obtain an NPDES permit for an Everglades restoration project in 1994 (before the State had CWA delegation). *See, e.g.*, EPA Permit No. FL0043885 (authorizing discharges from the Everglades Nutrient Removal Project to receiving waters at the L-7 canal in WCA 1). Petitioner has been applying for, and receiving Everglades NPDES permits at the very same time it is telling the courts that NPDES permits are unworkable for Everglades restoration. The Petitioner received NPDES permits for the STA (stormwater treatment areas), projects which authorize the discharge of treated waters. *See, e.g.*, NPDES Permit No. FL-0177946; (STA-2) FL-0177954 (STA-5); FL-0177962 (STA-1 west); Drew Dep. at 43-44. It would be a contradiction indeed to require NPDES permits for discharges from the storm treatment areas but to excuse them for the discharges from the S-9 pump station. Such contradiction is not found in the CWA.

### B. The CWA's Permit Requirements In This Case Do Not Impose An Undue Burden Upon Water Supply Districts Or Upon The Everglades Restoration Project

A proper analysis of the legal principles supporting the NPDES permit requirement in this case demonstrates that these principles would not impose an undue burden on water supply projects or upon the Everglades restoration effort itself. Despite the doomsday scenarios of the Petitioner and amici, the burden is not significant for several reasons: (1) the common dam structures which are significant components of water-supply projects are not covered by the principles of this case; (2) structures which release or eventually allow flow in the direction of natural flow are not



covered by the principles of this case; (3) EPA can use guidance and rulemaking to clarify other areas of non-application (e.g., substances in water which are not listed as statutory pollutants may be excluded as "pollutants" by rule if not leading to "pollution" as statutorily defined); (4) the few remaining areas of NPDES application under the principles of this case present no significant problems because the burden can be eased through permitting provisions, such as general or nationwide permits and single system-wide permits, and discharges are not likely to violate water quality standards in any event due to the designated use of the receiving water body; and (5) Everglades restoration will be aided because most restoration components already are required to obtain NPDES permits and such permits provide a necessary backstop to ensure that water quality goals are achieved.

1. Petitioner and amici make the totally unsubstantiated claim that water allocation dams, not at issue here, will be covered by the principles of this case. Petitioner asserts that the EPA position in *Gorsuch* — that water quality effects of flows from a dam were not a discharge from a point source — will be overruled if the Court requires a permit for the S-9 pump station. However, as discussed previously, requiring a permit here is not at odds with *Gorsuch* or with EPA's informal position there that the dam releases were not "additions" under the CWA. This case deals with classic external pollutants, taken into the point source and discharged from it against the natural flow, so that these external pollutants would not have entered the receiving water body without the affirmative pumping of the point source. *Gorsuch* concerned temperature changes, oxidation, *etc.*, caused by the changed movement of the dammed water, which is an entirely different situation. And *Consumers Power*, another

so-called "dam case," returned the water to the same place from which it was drawn. This is likewise simply not the circumstance here.

2. The principles of this case will not require NPDES permits for the various water supply structures which store, release or eventually allow water to flow in the direction of natural flow. This is because, in order to require a permit, the point source must introduce the pollutant into navigable water from any place outside the particular water body to which pollutants are introduced. *See* Pet. App. 5a-9a; *Catskill*, 273 F.3d at 491-92. If the pollutants were naturally flowing into receiving waters in any event, then a point source is not the "instrumentality" or "cause" or "reason" of additional pollutants in the receiving waters; and the point source likewise does not affect "an increase in numbers, size, or quantity" of pollutants in the receiving waters.

3. In any event, sound statutory interpretation and the EPA administrative implementation would still prevent unnecessary permitting. For example, EPA could use its guidance and rulemaking powers to address the issues associated with discharges against natural flow of substances, which are not listed in the statutory definition of "pollutants." If a material or substance is listed in the statutory CWA definition of pollutant, 33 U.S.C. § 1362(6), of course its discharge requires a permit. But the major concern of water supply districts is with substances in water which someone might consider to be "pollutants" but which are not itemized in the statutory definition. In some, or perhaps many instances, these potential "pollutants" may not be harmful either to the contributing water or to the receiving water. While these are clearly not the facts herein, many amici have been misled nonetheless into thinking that the principles of



this case would require NPDES permits in all such circumstances but this is not a foregone conclusion.

Statutory interpretation and/or EPA rulemaking can address these issues, which are not before the Court in this case, in other ways as well. For example, EPA might determine that materials or substances not itemized as statutory pollutants need not be classified as "pollutants" if they do not result in "pollution" as statutorily defined (". . . alteration of the chemical, physical, biological, and radiological integrity of the water"). 33 U.S.C. § 1362(19). Likewise, EPA might structure rules based upon whether waters are moved within the same designated uses or water quality standards.

4. Even when an NPDES permit is required, water supply districts could still be permitted through the use of general or nationwide permits and single system-wide permits. *See, e.g.*, 40 C.F.R. 122.28, 123.25. Furthermore, permits in most instances would be readily available because releases of water from and to water supply reservoirs and the like are almost certain to meet applicable state water quality standards, which are based on preserving the designated use of the receiving water body.[18] Water moved

18. The amicus briefs from the western states assert that the vast water collection and distribution networks contain clean water and do not contribute to water quality violations but nonetheless would be required by the decision below to apply for several hundred NPDES permits, Amicus brief of the states of Colorado *et al.*, at p. 3 n.2, or perhaps even millions of permits, Brief of Amici Curiae The Nationwide Public Projects Coalition, *et al.*, at p. 9-10. Colorado, the lead state of eleven Western state amici, asserts that only 4.6 percent of its waters are designated under CWA section

(Cont'd)

for water supply purposes through water supply canals and reservoirs, all of which have been designated by the state for water supply use, will almost by definition meet applicable water quality standards. This is not the case here. Instead a drainage canal, utilized for the main purpose of disposing of surface water containing high levels of pollutants, is being backpumped into the Everglades conservation areas without any controls on the quantity and type of water pollutants being discharged.

5. The claim that Everglades restoration will be impaired by the requirement for a permit here, is belied by the current application of NPDES requirements, and the issuance of NPDES permits, to many of the new Everglades restoration structures (discussed previously). In fact, NPDES permitting serves not as a hinderance but instead as a vital backstop to prevent backsliding from Everglades restoration. For example, in 2002 the S-9 pump station itself was slated for water quality clean-up by 2005. *See* Tribe's App. at 4a. But by 2003 the District had dropped this cleanup deadline (*see* Tribe's App. 5a), due to the expectation that the Florida Legislature would eliminate the 2006 deadline (which the Legislature changed to 2016 in general, and to 2036 for the C-11 Basin by approving a Long Term Plan extending C-11

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(Cont'd)
303(d) because of failure to meet water quality standards. It further contends that "[t]here is no evidence that transbasin diversions/ deliveries are the cause of any of these impairments." Amicus Colorado at p. 3 n.2. If it is in fact true that the water transport systems of the Western states do not create discharges that contribute to a violation of a water quality standard in the receiving water, the affirmance of the decision below will not impose a hardship on them. Colorado and the Western amici should, therefore, have no fear of NPDES permitting.



compliance). *See* previous discussion and section 373.4592(4)(e)(2), Florida Statutes; and Long Term Plan at 6-86. If pollutants from urban development in western Broward County discharged into the Everglades Protection Area (*see* Tribe's App. at 6a, 7a) are not subjected to regulatory oversight by NPDES permit requirements, the survival of this treasured wetlands is in peril. The CWA requires a permit, and neither Petitioner nor any of the amici have provided any basis in the CWA for the judicially created exemptions they seek.

## CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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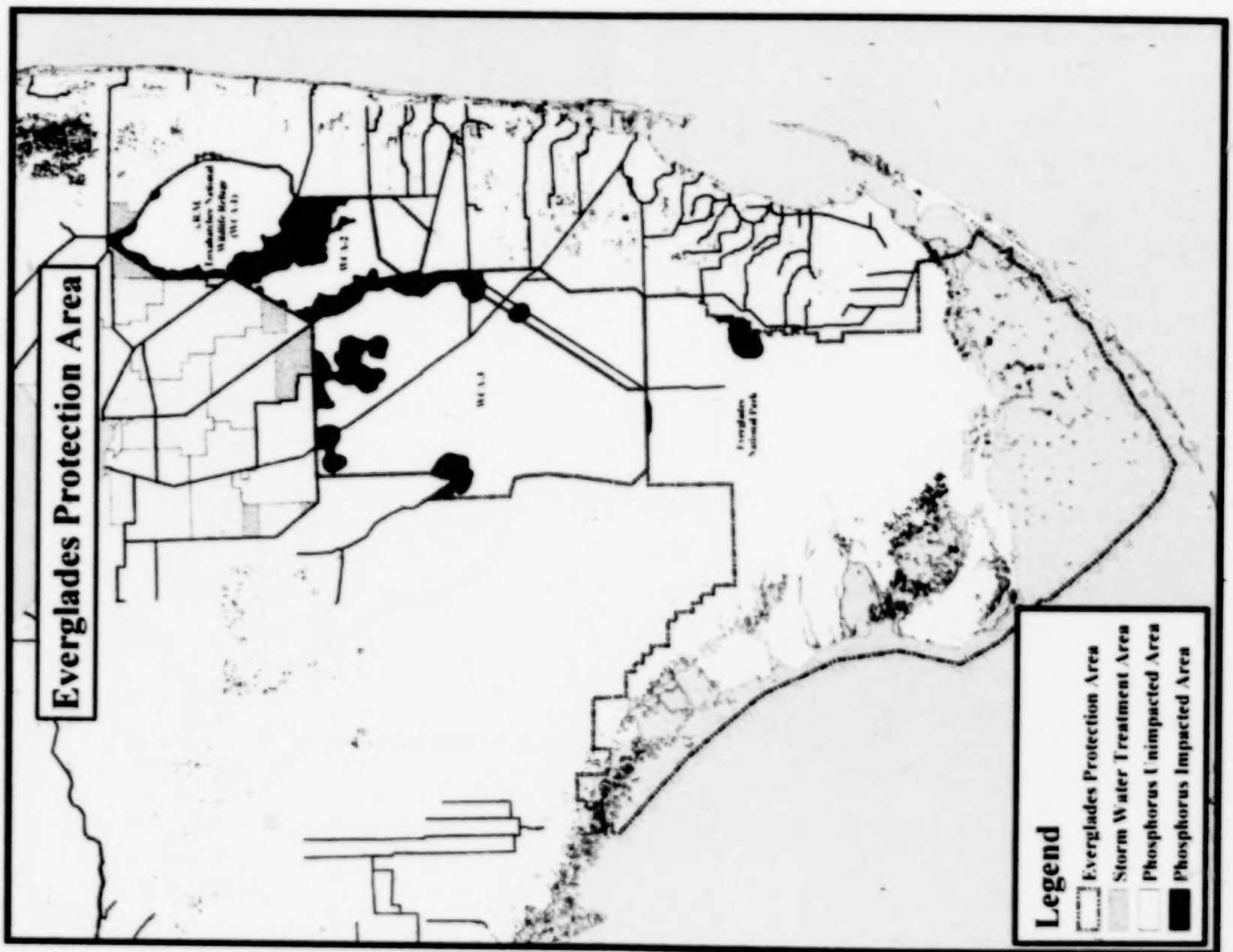
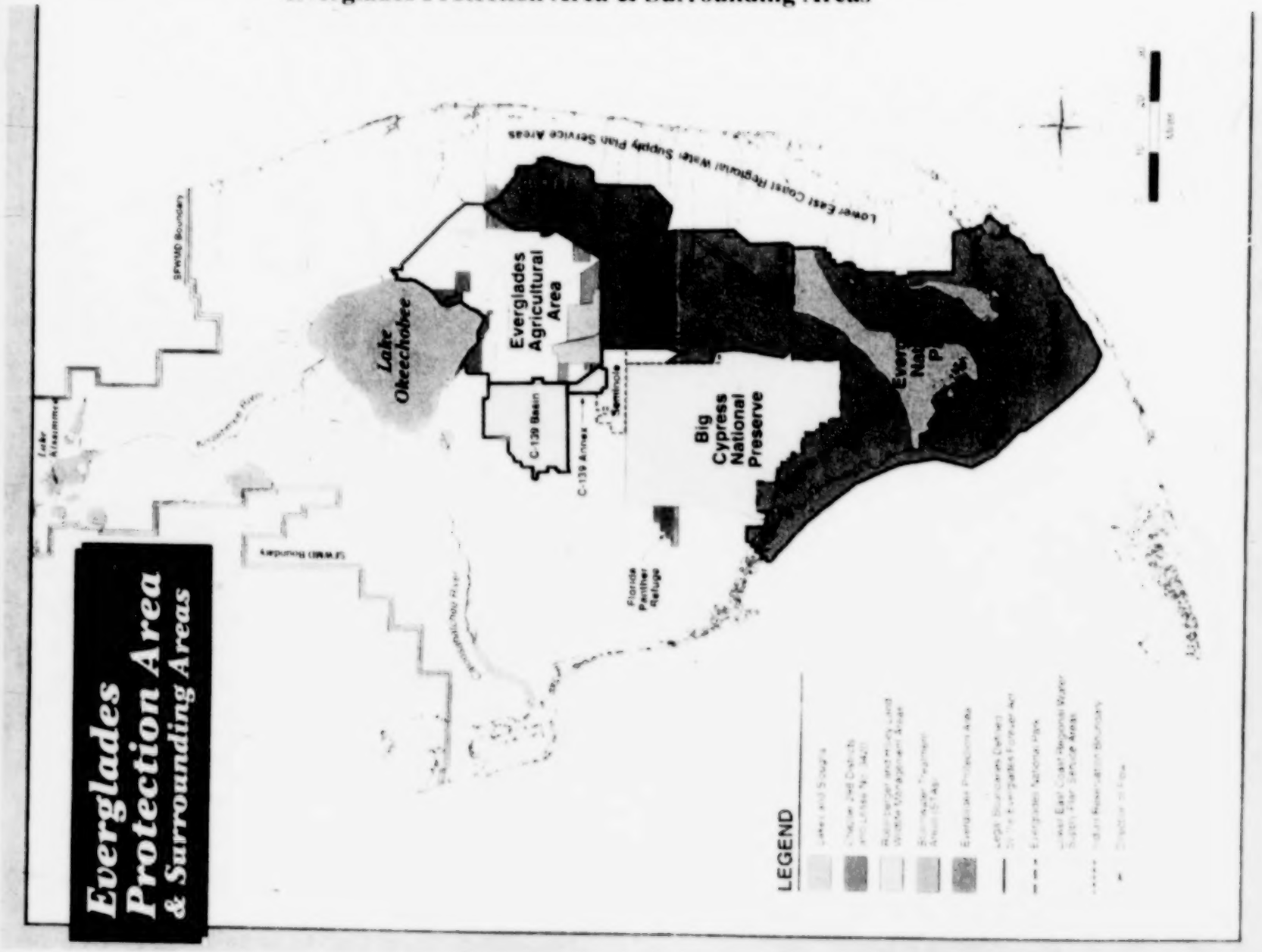
**Appendix A — SFWMD Map captioned, "Everglades Protection Area," available at www.dep.state.fl.us/evergladesforever/progress/map.htm (last visited 11/12/03)**



**Appendix B — SFWMD Brochure entitled "Everglades Program", Map captioned, "Everglades Protection Area & Surrounding Areas"**

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442, 450 n.16 (1975). Both EPA and DEP have critical expertise and experience in navigating the complexities of the labyrinthine CWA.

### A. The Eleventh Circuit Rejected EPA's Position On Improper Grounds.

The Eleventh Circuit improperly viewed the "addition" test as limited to dams and dam-induced water-quality changes. App., *infra*, 6a fn.4. The Sixth Circuit in *Consumers Power* rejected such an argument when applying the "addition" test to transfers between impoundment areas and a lake, noting that the five elements which make up the definition of a discharge must be present in "any set of circumstances" for NPDES permitting requirements to apply. *Consumers Power,* 693 F.2d at 583. The CWA does not distinguish between dams, levees, canals, or other flow diversion facilities in recognizing the nonpoint source nature of pollution caused by their changes to the movement of water. See 33 U.S.C. § 1314(f)(2)(F). Given the rationale underlying EPA's "addition" test, it remains neither explicitly nor logically limited to dams.

The absence of an express declaration by EPA particular to the S-9 should not diminish deference under the circumstances of this case. Given the agencies' close involvement with the development of alternative permitting processes and procedures, a formal written agency action declaring that NPDES does not apply would not be expected. Here both EPA and DEP specifically reviewed the water quality changes resulting from S-9 and chose a state regulatory program as the most appropriate method to control these changes. It does not follow that the agencies, for their position to be considered by the federal courts, must affirmatively disclaim the applicability of NPDES.



### B. Under The CWA's Statutory Scheme, Deference To The Implementing State Agencies Is Proper.

The CWA presents a cooperative federalism model that anticipates a partnership between the state and federal governments to restore and maintain the chemical, physical and biological integrity of the Nation's waters. See *Arkansas v. Oklahoma EPA*, 503 U.S. 91, 101 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987). Under this scheme, EPA may delegate to a state authority to administer the NPDES program, providing the states with a significant role in protecting their own natural resources. *Ouellette*, at 489, citing 33 U.S.C. § 1251(b). EPA retains strong supervisory authority and control. 33 U.S.C. § 1342(d). Through such a delegation in Florida, DEP infused local concerns and interests into the policies of the CWA.

In these circumstances, the Eleventh Circuit erred when it relied on *GTE South Inc. v. Morrison,* 199 F.2d 733, 745 (4th Cir. 1999) and the general rule that state agencies are not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*. This Court has noted that the question whether federal courts must defer to a state agency's interpretations of federal law remains unresolved under circumstances where Congress intended the states to play a strong role determining the policy implications of a federal regulatory scheme. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385 n.10 (1999).

Several federal courts have recognized deference to a state agency is appropriate where a state agency is given authority for implementation of a joint federal-state program. See *Perry v. Downling*, 95 F.3d 231, 337-38 (2d Cir. 1996); *US West Communications Inc. v. Public Serv. Comm of Utah*, 75 F. Supp.2d 1284 (D. Utah 1999); *Bellsouth Telecommunications, Inc. v. MCI Metro Access Trans. Ser., Inc.*, 97 F. Supp.2d 1363 (N.D. Ga. 2000); see also

*Attorney's Liability Assurance Society, Inc. v. Fitzgerald*, 174 F. Supp.2d 619, 629 n.2 (W.D.Michigan 2001) (state interpretations of the federal Liability Risk Retention Act of 1986 might warrant deference because Congress treated the state as a federal regulator and placed faith in the states' interpretations). Commentators have encouraged the federal courts to drop their skepticism toward state agencies in light of the faith Congress has increasingly placed in them. See P. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L.Rev. 1 (Jan. 1999).

Under the CWA, Congress placed their faith not only in the specialized knowledge of the state and administrative agencies, but also in the state's ability to infuse local concerns and experience into its policies. Congress developed a joint federal-state regulatory program, delegated authority to state agencies over the NPDES program and authorized EPA to supervise states' NPDES programs. In this case federal and state agencies both concurred that state permits are the appropriate mechanism to resolve the water quality problems arising from the S-9. App., *infra*, 43a-48a. Under these circumstances deference to both agencies is proper.

Nonetheless, the Eleventh Circuit has rejected the agencies' practices that were developed over thirty years. Its decision affects a drastic alteration of the existing allocation of responsibilities between states and the federal government concerning the regulation of water pollution. This Court has admonished against interpreting a statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. See *Owasso Independent School Dist. v. Falvo*, 534 U.S. 426 (2002).

It is the policies reflected by the agencies' continuous well-informed practices and actions that deserved consideration and respect from the Eleventh Circuit. Because the agencies' interpretation was based upon and remains fully



consistent with the plain language of the CWA properly read in context with the overall statutory scheme and its policies, the court should have deferred to the agencies' "addition" test.

## IV. THE PETITION SHOULD BE GRANTED, NOT HELD FOR *BORDEN RANCH PARTNERSHIP v. U.S. ARMY CORPS OF ENGINEERS*.

The Court has granted certiorari in *Borden Ranch v. United States*, No. 01-1243 (cert. granted 2002), to decide, among other questions:

> Does a rancher's deep plowing to enhance the soil's agricultural viability "add" a "pollutant" to a wetland, so as to constitute a regulated point source "discharge" within the meaning of Section 404 of the Clean Water Act?

A ruling in *Borden Ranch* that provides guidance to the meaning of an "addition" under the CWA would be relevant to this case since the SFWMD also contends that the "addition" requirement is not met. Nevertheless, holding this petition for *Borden Ranch* would not be appropriate. This case and *Borden Ranch* involve the scope of quite different permitting programs and very different factual situations. Whether physical alterations caused by plowing are found to be a "discharge" requiring a dredge and fill permit from the Corps under Section 404, is not likely to resolve the question in this case, whether the movement of pre-existing pollutants by a state water management agency constitutes a "discharge" requiring a NPDES permit from the state under Section 402.[5] *Borden*

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[5] Lower courts note that the "addition" requirement varies in the different contexts and separate regulatory frameworks of the § 404 dredge and fill program (33 U.S.C. § 1344) and the § 402 NPDES program (33 U.S.C. § 1342). See, e.g., *Froebel v. Meyer*, 13 F. Supp.2d

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*Ranch* also involves a number of additional issues upon which it may be decided without any guidance on the "addition" requirement.

The issue in this petition will remain alive and in urgent need of this Court's review however this Court decides *Borden Ranch*. Because the courts are in disarray as to an important issue concerning the scope of the NPDES, which will not be settled in *Borden Ranch*, the Court is urged to grant independent review.

## CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, held for the Court's ruling in *Borden Ranch*.

Respectfully submitted,

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October 2002.

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843 (E.D. Wis. 1998); *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 205 n.5 (D. Mont. 1990). The Eleventh Circuit ignored basic distinctions between Sections 402 and 404 when it relied upon Section 404 cases to support its interpretation of an "addition." App., *infra*, at 7a n.5 (citing 33 U.S.C. § 1344 and *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505 (11th Cir. 1985)). Such cases are inapposite.



[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 00-15703

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D. C. Docket Nos. 98-06056-CV-WDF
& 98-06057-CV-WDF

(Filed February 1, 2002)

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
SAM POOLE,

Plaintiffs-Appellees,

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendant-Appellant.

---

FRIENDS OF THE EVERGLADES,

Plaintiff-Appellee,

versus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Southern District of Florida

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**(Filed February 1, 2002)**

Before EDMONDSON and CARNES, Circuit Judges, and MUSGRAVE*, Judge.

EDMONDSON, Circuit Judge:

The Miccosukee Tribe of Indians ("the Tribe") and the Friends of the Everglades ("the Friends") (together "Plaintiffs") brought a citizen suit under the Clean Water Act ("CWA") against the South Florida Water Management District ("the Water District"). The suit alleges that the Water District was violating the Clean Water Act by discharging pollutants from the S-9 pump station into Water Management District 3A without a national pollution discharge elimination system ("NPDES") permit.

The parties filed cross-motions for summary judgment. The district court denied the Water District's motion, granted Plaintiffs', and enjoined the Water District from operating the S-9 pump station without an NPDES permit. The Water District appeals from the district court's order declaring unlawful the Water District's operation of the S-9 pump station without an NPDES permit and from the injunction prohibiting the same.[1]

## I. BACKGROUND

The South Florida Water Management District manages the Central & Southern Florida Flood Control

* Honorable R. Kenton Musgrave, Judge, U.S. Court of International Trade, sitting by designation.

[1] The district court also concluded that Plaintiffs' claims against Defendant were not barred by the doctrine of sovereign immunity. The Water District has not appealed this ruling.



Project. This management is through the operation of many levees, canals and water impoundment areas. The areas now called the C-11 Basin and the Water Conservation Area-3A ("WCA-3A") were historically part of the Everglades. But, in the early 1900's, the Army Corps of Engineers began digging the C-11 Canal to facilitate the draining of the western portion of Broward County which is part of the C-11 Basin. Then, in the 1950's, the Corps constructed the L-37 and L-33 levees to create WCA-3A to the west of the C-11 Basin and completed construction of the S-9 pump station.

The C-11 Canal runs through the C-11 Basin and collects water run-off from the Basin and seepage through the levees from WCA-3A. The S-9 pump station then pumps this water through three pipes from the C-11 Canal through the L-37 and L-33 levees into WCA-3A at a rate of 960 cubic feet per second per pipe. Without the operation of the S-9 pump station, the populated western portion of Broward County would flood within days.[2]

The water which the C-11 Canal collects and which the S-9 pump station conveys into the WCA-3A contains pollutants. In particular, this water contains higher levels of phosphorus than that naturally occurring in WCA-3A. The S-9 pump station, however, adds no pollutants to the water which it conveys.

[2] But for the construction of the L-33 and L-37 levees and the C-11 canal, water would flow as a sheet across WCA-3A and the C-11 Basin in a southerly direction. Now, because of the construction of these structures, water from the C-11 Basin generally does not flow west into the WCA-3A without the operation of S-9.

The district court concluded that, because the waters collected by the C-11 Canal contained pollutants and this water would not flow into WCA-3A without the operation of the S-9 pump station, S-9 added pollutants to the WCA-3A in violation of the CWA. On appeal, the Water District contends that the district court erred as a matter of law in concluding that S-9's conveyance of water from the C-11 Canal into the WCA-3A constituted a discharge of pollutants.

## II. DISCUSSION

### A. Pumping of Polluted Water

We review the district court's grant of summary judgment to Plaintiffs *de novo,* applying the same legal standard as the district court. *Hendrickson v. Ga. Power Co.,* 240 F.3d 966, 969 (11th Cir. 2001). For summary judgment to be proper, no genuine issue can exist on a material fact; and the moving party must be entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing the evidence, we must draw all reasonable, factual inferences in favor of the non-moving party. *Carriers Container Council, Inc. v. Mobile S.S. Ass'n,* 896 F.2d 1330, 1337 (11th Cir. 1990).

The Clean Water Act prohibits the discharge of pollutants from a point source into navigable waters without an NPDES permit. *See* 33 U.S.C. §§ 1311, 1342. The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *See* 33 U.S.C. § 1362(12). No party disputes that the S-9 pump



station and, in particular, the pipes from which water is released constitute a point source[3] or that the water released by the station contains pollutants. Also, both parties agree that the C-11 Canal and the WCA-3A constitute navigable waters. The parties mainly dispute one legal issue: whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source.

Relying on a line of hydroelectric-dam cases, the Water District argues that no addition of pollutants from a point source can occur unless a point source adds pollutants to navigable waters from the outside world. See *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156, 175 (D.C.Cir.1982) (showing deference to EPA's interpretation that "[an] addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world"); *Nat'l Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580, 584 (6th Cir. 1988) (same).[4] Under the

[3] A point source is defined to be "any discernible, confined and discrete conveyance, including but not limited to any pipe ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[4] In *Gorsuch,* the District of Columbia Court of Appeals gave deference to the EPA's position that, because pollutants were the result of dam-induced water-quality changes, a dam did not add pollutants from the outside world and, thus, no NPDES permit was required for a dam to release the water into a downstream river. *Id.* at 174-75. In another case involving a dam and dam-induced water-quality changes, the Sixth Circuit also concluded that the EPA's position on this question should be deferred to if reasonable. *See Consumers Power,* 862 F.2d at 584. Both the Sixth and District of Columbia Circuits, in essence, gave *Chevron* deference to the EPA's position that the release of water which had been polluted by dam-related, water-quality changes and which flowed from a dam into another body of navigable water constituted no "discharge of pollutants." *But see Catskill Mountains Chapter of Trout*

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Water District's interpretation, when a point source conveys one navigable water into another, no addition of pollutants will occur unless the point source itself is the source of the pollutants which it releases. And, because S-9 does not itself introduce pollutants from the outside into the water which it conveys, the Water District contends no addition of pollutants occurs.

First, we conclude that, in determining whether pollutants are added to navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water. Thus, we must determine whether pollutants are being added to WCA-3A. They are.[5]

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*Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490 (2d Cir. 2001) (concluding EPA's position in *Gorsuch* and *Consumers Power* which was based on policy statements and consistent litigation positions is not entitled to *Chevron* deference); *see also Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines . . . do not warrant Chevron-style deference.").

We know of no instance in which the EPA has extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station. The EPA is no party to this case; we can ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference.

We also reject the Water District's argument that the Florida Department of Environmental Protection's decision, using the *Gorsuch* addition test, that operation of the S-9 pump does not require an NPDES permit is entitled to *Chevron* deference. A state agency's interpretation of federal law is generally not entitled to deference by the courts. *GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999).

[5] We reject the Water District's argument that no addition of pollutants can occur unless pollutants are added from the outside world insofar as the Water District contends the outside world cannot include another body of navigable waters. *Cf. Catskill Mountains*, 273 F.3d at 491 (construing "outside world" to include "any place outside the

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Nevertheless, for an addition of a pollutants to navigable waters to require an NPDES permit, that addition of pollutants must be from a point source. And, for an addition of pollutants to be from a point source, the relevant inquiry is whether – but for the point source – the pollutants would have been added to the receiving body of water.[6] We, therefore, conclude that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters.

When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point

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*particular* water body to which pollutants are introduced") (emphasis added). This conclusion is also consistent with precedent concluding that a redeposit of soil which has been dredged by a boat's propellers can constitute an addition of pollutants requiring regulation by the "dredge and fill" permitting system of the CWA, 33 U.S.C. § 1344. *See United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated on other grounds by* 481 U.S. 1034, 107 S. Ct. 1968 (1987), *reinstated in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988).

[6] As noted above, the Water District concentrates on the fact that S-9 is not the original source of the pollutants in the water which it conveys. For pollutants to be *from* a point source, the point source does not necessarily have to be the source or origin of pollutants. "From a point source" can also indicate the "agent or instrumentality" or the "cause or reason" by which the pollutants are added to navigable waters. *See* The Random House Dictionary of the English Language 770 (2d ed. 1987) (defining "from"). We conclude that this interpretation of "from" is most apt: from = by. And no dispute exists on whether pollutants, in fact, are added to navigable waters (WCA-3A) *by* a point source (S-9) here.

source is the cause-in-fact of the discharge of pollutants.[7] And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs. Neither party disputes that, without the operation of the S-9 pump station, the polluted waters from the C-11 Canal would not normally flow east into the WCA-3A.[8] The S-9 pump station, therefore, is the cause-in-fact of the addition of pollutants to the WCA-3A. We,

[7] Our conclusion is consistent with the views of the First and Second Circuits. In *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), the First Circuit concluded that the piping of water from the polluted East Branch River for commercial use and its proposed release into the upstream Loon Lake would constitute an addition of pollutants from a point source. *Id.* at 1296-99. Then, in *Catskill Mountains*, the Second Circuit concluded that the diversion of water from a reservoir containing pollutants by tunnel into a creek for which the reservoir was not naturally a source would constitute an addition of pollutants from a point source. *Catskill Mountains*, 273 F.3d at 492. Both courts emphasized that the two bodies of water were separate and that pollutants would not enter the second body except for the point source.

[8] Both the C-11 Basin and the WCA-3A were part of the historical Everglades. Before construction of the C-11 Canal, the Levees, and the S-9 pump station, the surface and ground waters on both side of the Levees intermingled. The natural flow of the waters at that time was a southerly moving sheet of water. But for man's intervention, these waters would essentially be a single body of navigable water.

Since the completion of the L-33 and L-37 levees, water does not flow from the C-11 Canal into WCA-3A. Man has made the two bodies of water two separate and distinct bodies of water. The Water District argues that the historical hydrological connectedness of these two bodies of water (1) precludes a finding that the WCA-3A and the C-11 Canal are two distinct bodies of water, and (2) precludes a finding that the operation of the S-9 changes the "natural" flow of water between these two bodies. In the context of the circumstances of this case, we reject the Water District's argument.



therefore, conclude that the release of water caused by the S-9 pump station's operation constitutes an addition of pollutants from a point source.

## B. The Injunction

Next, the Water District contends that the district court abused its discretion by enjoining the Water District from operating the S-9 pump station without an NPDES permit. The Water District argues that the court erred by not applying traditional equitable standards in its grant of the injunction. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320, 102 S. Ct. 1798, 1807 (1982) (prohibition against discharge of pollutants in CWA does not foreclose exercise of equitable discretion). And, according to the Water District, had the district court balanced the potential harm caused by enjoining the operation of S-9 against the harm prevented,[9] the court would have concluded that S-9 should not be enjoined from operating without an NPDES permit.

We review for an abuse of discretion the district court's decision to grant an injunction under the CWA. *Romero-Barcelo*, 456 U.S. at 320, 102 S. Ct. at 1807. In determining whether an injunction is proper, not only should a district court "balance[ ] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction[,]" but the court "should [also] pay particular regard for the public consequences in employing the

[9] Without the operation of S-9, the western portion of Broward County would flood in only days.

extraordinary remedy of injunction." *Id.* at 312, 102 S. Ct. at 1803 (citation omitted); *see also Million Youth March, Inc. v. Safir,* 155 F.3d 124, 125 (2d Cir. 1998) ("An injunction is an exercise of a court's equitable authority, and the exercise of that authority, in the vindication of any legal protection . . . must sensitively assess all the equities of the situation, including the public interest."); *Okaw Drainage Dist. v. Nat'l Distillers & Chem. Corp.,* 882 F.2d 1241, 1248 (7th Cir. 1989) ("[A]n injunction . . . may not be granted without consideration of the equities, including the costs that the injunction is likely to impose on third parties."). Because the cessation of the S-9 pump would cause substantial flooding in western Broward County which, in turn, would cause damage to and displacement of a significant number of people,[10] we conclude that the people of Broward County have a very significant interest in whether the S-9 pump station's operation should be enjoined.

The district court's injunction prohibits the Water District from operating S-9 without an NPDES permit. If this injunction were enforced, the Water District could not continue to operate S-9 while applying for an NPDES permit.[11] And although on appeal Plaintiffs defend the

[10] Broward County is a highly populated county with a population of 1,623,081 according to the 2000 United States Census. *See* Ranking Tables for Counties: Population in 2000 and Population Change from 1990 to 2000 (PHC-T-4) (2001), *available at* http:// www.census.gov/population/cen2000/ phc-t4/tab01.pdf.

[11] In their briefs, Plaintiffs try to draw a distinction between a hypothetical injunction which enjoins the operation of S-9 and the actual injunction which enjoins the operation of S-9 without an NPDES permit. Because S-9 currently has no NPDES permit, this distinction is

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district court's injunction, Plaintiffs have repeatedly represented that they – because of the substantial flooding of Broward County which would result – do not really seek the cessation of S-9's operation. At the summary judgment motion hearing before the district court, Plaintiffs said these things:

> We would like [the Water District] to be enjoined from continuing [discharging pollutants without an NPDES permit.]
>
> *Now, I don't, in any way, propose turning off the pump. That has been discussed a couple of times here. It's sort of a frightening option, but I don't think that specifically is feasible.*
>
> However, if [the Water District] were ordered to apply and take all necessary and appropriate measures to obtain as quickly as possible the necessary permits, to actually use the permit in compliance with the law. . . .
>
> *So we are not asking that you just turn off the pump or suddenly stop every single pollutant. . . .*
>
> So, declare them in violation. Order them to get out of violation, to obtain the necessary permits, to discharge in the legal manner.

R-164 at 64-65 (emphasis added).

one without a difference. The injunction that was entered does mandate that S-9's operation be discontinued.

After the district court enjoined the operation of S-9 without a permit, the Water District brought an emergency motion for relief from the judgment. Because of the disastrous consequences of discontinuing S-9's operation, Plaintiffs did not oppose this motion and agreed that a stay of the injunction was proper.[12] And, in response to the Water District's motion for reconsideration to the district court, Plaintiffs stated that they would agree to whatever stays were necessary for the Water District to obtain an NPDES permit for S-9. Plaintiffs, thus, appear to recognize and admit the exceedingly serious public loss that would result from enforcing the district court's injunction.

From the record before us, we cannot conclude that the district court's injunction could ever be properly enforced. Nor can we conclude that Plaintiffs have ever really intended for that injunction to be enforced. The flooding of western Broward County and the resulting displacement of the residents there do far outweigh the continued addition of low levels of phosphorus to WCA-3A without an NPDES permit. No district court faced with the record could correctly conclude otherwise.

The United States Supreme Court warns "[t]here is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the

[12] The district court originally granted a forty-day stay of the issuance of the injunction for the Water District to seek an NPDES permit for S-9. *See* R-125, R-136. The parties then filed a joint motion to extend the stay of injunctive relief pending resolution of this appeal or the receipt of an NPDES permit. The district court granted this joint motion. R-142 at 1-2.



issuing [sic] an injunction." *Truly v. Wanzer,* 46 U.S. (5 How.) 141, 142 (1847). "Once issued, an injunction may be enforced." *Hutto v. Finney,* 437 U.S. 678, 690, 98 S. Ct. 2565, 2573 (1978). So, we do not want injunctions to linger in existence when they are not right. Moreover, this "strong arm of equity," *see Truly,* 46 U.S. at 142, is debased and weakened if used to issue injunctions which cannot rightly be enforced and are actually never intended to be enforced. "The equity court . . . must always be alert in the exercise of its discretion to make sure that its decree will not be a futile and ineffective thing." *MacDougall v. Green,* 335 U.S. 281, 290, 69 S. Ct. 1, 5 (1948) (Douglas, J., dissenting). Injunctions must be taken seriously. What the courts order to be done should be done. And what should not or cannot be done must not be ordered to be done.

At the hearing leading up to the injunction, some evidence and argument pointed out that severe flooding would occur if S-9 were shut down. But, a lot of information about other points was also presented to the district court at about the same time. At the later hearing on the Water District's emergency motion for relief from judgment, the district court stated, "I was not aware that the injunction would have the dire consequences of literally opening the flood gates." R-165 at 2. It seems to us that, in the light of the district court's wrong impression of the consequences, the district court could not have correctly balanced the possible harms – especially the harm to the public – caused by the enjoinment of S-9 against the benefits when it granted its injunction. That the district court agreed to stay the injunction, when the dire consequences were brought home to the district court, does not make the injunction any less an abuse of discretion.

Instead of issuing an injunction which cannot be rightly enforced, the district court should order the Water District to obtain an NPDES permit within some reasonable period. And, if the Water District fails to comply with this order, Plaintiffs may then seek to enforce the order through the various enforcement mechanisms available under the CWA, such as fines and criminal penalties. *See* 33 U.S.C. § 1319.

For the foregoing reasons, we AFFIRM the district court's judgment that the Water District violated the Clean Water Act, VACATE the judgment awarding the injunction, and REMAND for further proceedings consistent with this opinion.

AFFIRMED in part, VACATED in part, and REMANDED.

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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, and SAMUEL POOLE,

Defendants.
_____/

Case No. 98-6056-CIV-FERGUSON

FRIENDS OF THE EVERGLADES,

Plaintiff

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendant.
_____/

Case No. 98-6057-CIV FERGUSON

**ORDER ON MOTION FOR SUMMARY JUDGMENT**

(Filed Sep. 30, 1999)

**THIS CAUSE** is before the Court on the Plaintiff Miccossukee Tribe's Motion for Summary Judgment on All Counts of the Tribe's Complaint [D.E.60] and on the Defendant's Motion for Final Summary Judgment [D.E.66]. Having duly considered the motions, responses, oral argument of counsel and pertinent portions of the record, it is

**ORDERED AND ADJUDGED** that the plaintiff's motion for summary judgment [D.E.60] is **GRANTED**. The defendants' motion for summary judgment [D.E.66] is **DENIED**.

## Factual Background

The Miccosukee Tribe of Indians of Florida (the "Tribe") is a federally-recognized Indian Tribe. For generations the Tribe and its members have resided and worked within the Florida Everglades (the "Everglades").[1] The Tribe has land interests lying within the Everglades, including a perpetual lease to most of Water Conservation Area 3A ("WC 3A"). The way of life of the Tribe and its members, including their religious, cultural, economic, and historical identity, is based upon the Everglades ecosystem and upon preservation of the Everglades in its natural state, including but not limited to the quantity and quality of the Everglades' waters.[2]

The Everglades is an oligotrophic[3] wetlands system which is phosphorus limited and sensitive. The level of phosphorus, a nutrient, is the defining chemical characteristic of the system in that the exhaustion of the available

[1] The term Everglades as used herein refers to the areas presently identified as the Florida Water Conservation Areas, including Water Conservation Area 3A, and Everglades National Park, although the Everglades ecosystem historically included a much larger area.

[2] The Tribe's religious activities include the planting and harvesting of corn on tree islands on the Everglades; its subsistence activities include "gathering of materials", hunting, and fishing; its commercial activities include frogging, airboating and other guided tours and providing recreational and tourism facilities within the Everglades.

[3] A body of water poor in plant nutrient minerals and organisms and usually rich in oxygen in all depths.



phosphorus limits the type and distribution of aquatic flora, and fauna. The addition of phosphorus above natural levels causes an imbalance in flora and fauna resulting in additional detrimental growth. Further, the Everglades has some characteristics of ultra-oligotrophic systems, which are even more phosphorus limited and phosphorus sensitive than oligotrophic systems.[4]

In the 1950's the South Florida Water Management District's ("SFWMD") S-9 pumping station ("S-9") with its three pipes,[5] located in urban Broward County, was completed. SFWMD, one of the five water management districts in Florida created by the Florida Legislature and allegedly a state agency, is charged with the operation and management of S-9. Samuel Poole ("Poole") was the executive director of SFWMD when this action commenced.[6] The Tribe alleges that S-9, is the cause of the pollutants, and has been backpumping contaminated water which contains nutrients, such as phosphorus, into the Everglades specifically into WC 3A, a jurisdictional water of the United States, without the required National

[4] The oligotrophic conditions of the Everglades were recognized by the Florida Department of Environmental Protection and the South Florida Water Management District in the 1992 Settlement Agreement and Consent decree in case number 88-1886-CIV-HOEVELER.

[5] There are three pumps at the S-9. Each one of the pumps can pump 960 cubic feet per second. There are three pipes on the west side of S-9 from which water is discharged. If the S-9 pumps are not in operation, water does not discharge from the pipes. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984).

[6] Poole is no longer the executive director of SFWMD. A suit against him in his official capacity is essentially a suit against the SFWMD. Therefore, the Court need not consider immunity against Poole separately.

Pollutant Discharge Elimination System ("NPDES")[7] permit. The Tribe alleges that the absorption of pollutants in the Everglades is causing degradation not only in the water quality but in the plant materials, soils, animal habitat and biological life, causing long term and perhaps permanent damage to the Everglades' system.

The Tribe states that much of the water released from S-9 comes from the C-11 canal which is an external source of pollutants to the Everglades, a separate body of water, and of significantly different water quality than the Everglades. In addition to the pollution into the Everglades allegedly caused by the S-9, the Army Corps of Engineers has been authorized by Congress to construct the Modified Water Deliveries project to restore water to Everglades National Park through northeastern Shark River Slough, which will result in further pollution to relatively pristine areas. The project will involve creating gaps in the L-67 Levee between WC 3A and WC 3B thus opening up relatively pristine WC 3B and the National Park Everglades to polluted water from the S-9 pump. It is alleged further that if the S-9 pump is not operating the water sits in the C-11 canal, its natural direction of flow being from west to east, and the polluted water does not flow into the Everglades and CW 3A.

SFWMD argues that the water released from S-9, although containing pollutants, is not adding pollutants to the Everglades because the water from C-11 seeps into the

[7] A NPDES permit is an operations permit issued by the EPA to waste water facilities discharging pollutants through a point source or discrete conveyance. The Tribe states that SFWMD has no pending applications for a NPDES permit.



Everglades as ground water, and both areas were part of the historical Everglades. Consequently, SFWMD continues, S-9 merely passes water between two parts of the same body of United States water and therefore does not create pollutants; that they are created by the C-11 and its adjacent land uses. For these reasons, SFWMD contends, a NPDES permit is not needed for S-9 and neither the U.S. Environmental Protection Agency nor the State of Florida Department of Environmental Regulation required one.

**Standard for Summary Judgment**

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Similarly, a fact is "material" if it might affect the outcome of the suit under the governing substantive law. *Anderson*, 477 U.S. at 247.

In considering this motion for summary judgment, the Court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the defendant should prevail as a matter of law." *Id.* at 243. The movant bears the initial burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding whether the movant has

met this burden, the Court must view the evidence and all factual inferences in the light most favorable to the non-movant. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992). "If reasonable minds could differ on the inferences arising from undisputed facts, summary judgment should be denied." *Id.* at 1534.

Once the initial burden is met, the non-movant must come forward with specific facts showing that there is a genuine issue for trial that precludes summary judgment. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence presented cannot consist of conclusory allegations, legal conclusions or evidence which would be inadmissable at trial. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). Likewise, "a mere scintilla of evidence supporting a position will not suffice; there must be enough of a showing that the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Failure to make a showing sufficient to establish the existence of any essential element of a claim is fatal and requires the entry of summary judgment. *Celotex Corp.*, 477 U.S. at 322-323.

**Issues Presented**

The issues raised are: whether SFWMD is an arm or agency of the state immune from federal action by the Eleventh Amendment of the Constitution and whether there is an addition of pollutants when water containing pollutants is discharged from S-9, a disputed point source, into the Everglades therefore requiring a NPDES permit in order to operate the S-9 pump.

The Tribe moves for summary judgment on Count I and II of its complaint which allege that both the SFWMD



and Poole violated the Federal Water Pollution Control Act ("Clean Water Act") 33 U.S.C. § 1251 *et seq.* by failing to obtain a NPDES permit before transferring water between the C-11 canal and the Everglades through S-9. SFWMD and Poole have filed cross-motion for summary judgment.

The parties agree that the waters in question are navigable waters of the United States, and that the C-11 water discharged form S-9 into the Everglades is a pollutant.

**Eleventh Amendment Immunity**

The Eleventh Amendment grants immunity to states in federal court. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). It provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. 11.

The Eleventh Amendment does not extend to counties or similar municipal corporations. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The states' immunity from suit specifically applies to Indian tribes. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 775 (1991). Whether an entity is an arm or agency of the state protected by the Eleventh Amendment is a question of federal law determined with reference to applicable state law. *Magula v. Broward Gen. Med. Ctr.*, 742 F.Supp. 645, 648 (S.D. Fla. 1990); *Fouche v. Jekyll Island – State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir.

1983). The Eleventh Circuit has identified the following factors for consideration in determining if an entity is an arm or agency of the state protected by the Eleventh Amendment: (1) how state law defines the entity; (2) the entity's fiscal autonomy; (3) what degree of control the state maintains over the entity; (4) where funds for the entity are derived; and (6) who is responsible for judgments against the entity. *Tuveson v. Florida Governor's Counsel on Indian Affairs, Inc.*, 734 F.2d 730, 732 (11th Cir. 1984).

Whether an entity is a state agency for the purposes of applying certain Florida statutes is a separate and independent question from whether the entity is a state agency for Eleventh Amendment purposes. *Tuveson,* 734 F.2d at 735. The United States Supreme Court emphasized that a judicial analysis should focus on the Eleventh Amendment's fundamental purposes: to prevent judgments from depleting state treasuries and to maintain the integrity retained by each state in our federal system.[8] *Hess v. Port Auth. Trans-Hudson,* 513 U.S. 30, 51 (1994). It is the burden of SFWMD to establish the immunity alleged. *Christy v. Pennsylvania Turnpike Comm'n,* 54 F.3d 1140, 1144 (3d Cir. 1995).

[8] A claim seeking prospective injunctive relief against a state officer's ongoing violation of federal law can ordinarily proceed in federal court, and is not barred by Eleventh Amendment. *Doe v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998). On that theory, arguably, this action could proceed without addressing the Eleventh Amendment issue in that the plaintiffs are not seeking damages.



1. How the State Defines SWFMD

The Florida Water Resources Act of 1972, Fla. Stat. § 373.069, which created five water management districts including the SFWMD, does not characterize SFWMD as an arm or agency of the state. Florida Statute § 189.403(6) defines SFWMD as a "special district":

> Water management district for purposes of this chapter means a special taxing district which is a regional water management district created and operated pursuant to chapter 373 or chapter 61-691, Laws of Florida, or a flood control district created and operated pursuant to chapter 252270, Laws of Florida as modified by s. 373.149.

Courts in the District are divided on the question. Those holding that SFWMD is a state agency immune from suit are *Miccosukee Tribe of Indians of Florida v. South Florida Water Management Dist.*, 980 F. Supp. 448 (S.D. Fla. 1997), *Bensch v. South Florida Water Management Dist.*, No. 95 Civ. 1202 (S.D. Fla. 1996) and *Indian Trails Water Control District v. South Florida Water Management Dist.*, No. 96 Civ. 8528 (S.D. Fla. Dec. 12, 1996). The cases reaching the opposite conclusion include *Thomas v. South Florida Water Management Dist.*, No. 96 Civ. 896 (M.D. Fla. Mar. 23, 1998) and *IT Corp. v. South Florida Water Management Dist.*, No. 97 Civ. 8872 (S.D. Fla. July 20, 1998). As the determination is a matter of fact and because the factual record may be better developed here than in previous cases, the Court will undertake an independent analysis.

Unlike a state agency SFWMD is entitled to and does levy *ad valorem* taxes. Article VII § 9 of the Florida Constitution states in relevant part:

> (a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes. . . .
>
> (b) Ad valorem taxes . . . shall not be levied in excess of the following millages . . . for water management purposes for the remaining portions of the state, 1.0 mill; and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation.

*See also* Fla. Stat. §§ 373.1962 and 373.503. Such authority to levy *ad valorem* taxes is prohibited to the State as stated in Article VII, § 1 of the Florida Constitution:

> (a) No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

Contrary to SFWMD's assertion that the Florida Constitution allows it to levy *ad valorem* taxes as a "state agency" the Constitution can only be read to mean that certain "special districts", SFWMD being one of them, are allowed *ad valorem* taxing authority but not as a state agency. Of further significance is Poole's deposition testimony wherein he testifies that SFWMD is responsible for its own judgments. The record lacks evidence showing that the state would be liable for judgments against SFWMD. For these reasons the Court finds that on this factor SFWMD would not meet state law definition of an agency of the state for purposes of the Eleventh Amendment.



2. SFWMD's Fiscal Autonomy

The Florida Statutes show that SFWMD is a self-funded entity with the power to tax, to borrow to pay expenses, to issue interest bearing negotiable notes and pledge the proceeds of taxes levied. *See* Fla. Stat. §§ 373.503, 373.506, 373.5639. Section 373.501 states that the Department of Environmental Regulation "may allocate to the water management districts from funds appropriated to the department such sums as may be deemed necessary to defray the costs of administrative, regulatory, and other activities of the district." The state's discretionary authority to contribute to SFWMD's operational expenses does not establish conclusively that SFWMD is dependent on the state. Many other entities, for example, school districts, are highly funded by the state but are not considered state agencies for Eleventh Amendment purposes.

3. The States Degree of Control over SFWMD

SFWMD claims that it is controlled by the state and relies on *Fouche* and several sections of the Florida Statutes to support its assertion. Statutory controls exercised by the state over SFWMD include: (1) the Governor appoints and the Florida Senate confirms the governing board members of SFWMD, Fla. Stat. § 373.073; (2) the Governor approves the executive director after the Florida Senate has confirmed the appointment by the SFWMD's board, Fla. Stat. § 373.079(4)(a); (3) the Department of Environmental Protection "shall, to the greatest extent possible, exercise supervisory authority over all water management districts", Fla. Stat. §§ 373.026(7); (4) SFWMD is required to submit an annual budget and expense report to the Governor, Legislature and the governing body of

each county, Fla. Stat. § 373.507; (5) the state's Auditor General may, at the direction of the Governor, audit each district's accounts, Fla. Stat. § 373.589; (6) the district's annual budget may be adopted only after adequate notice to the public and public hearing, Fla. Stat. § 373.536.

There are indeed fiscal controls and limitations on authority imposed upon SFWMD by statute but none are inconsistent with legal autonomy, i.e., the power to sue and be sued. In *Fouche* the park authority had additional ties to the state that SFWMD does not have with Florida, e.g., the state was required to approve all park land sales. *Fouche,* 713 F.2d at 1521. In *Fouche* it was also pivotal that a judgment against the Park Authority would probably be paid by the state. In this case the fact that SFWMD has the power to fund itself through *ad valorem* taxation, and to borrow money and that direct financial support by the state is discretionary, leans in favor of a finding that SFWMD is not an instrumentality of state government.

4. SFWMD's Source of Funds and Responsibility for Judgements Against SFWMD

As found above SFWMD through its *ad valorem* taxation and borrowing powers is capable of an independent financial existence even though the state may voluntarily appropriate funds for its operation. On a fact not considered in other cases in the district SFWMD's executive director conceded in deposition testimony, that payment of a judgment against SFWMD would not come from the state appropriations but from *ad valorem* taxes, agricultural privilege tax or an insurer. Neither the Florida Constitution, or statutes make the state responsible for paying judgments against SFWMD and no evidence is found in the record to support the contention.



Based on consideration of the factors required by the Eleventh Circuit, this Court finds that SFWMD is not an arm or agency of the state for Eleventh Amendment purposes.

**S-9 Pump as Polluting Point Source**

The Clean Water Act is a comprehensive water quality statute enacted by Congress to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Congress established the NPDES permit program as the primary means for enforcing effluent limitations imposed to achieve the Clean Water Act's objectives. *Weber v. Trinity Meadows Raceway, Inc.,* 1996 WL 477049 (N.D. Tex. 1996). The Clean Water Act prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless a NPDES permit is issued. 33 U.S.C. § 1342; *National Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580, 583 (6th Cir. 1988). The term "'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters, (B) any addition of any pollutant to the waters of a contiguous zone from any point source or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). The definition of pollutant includes solid waste, sewage, garbage, biological materials, and wrecked or discarded equipment. 33 U.S.C. § 1362(6). Navigable waters means the waters of the United States. 33 U.S.C. § 1362(7). The term point source is defined as "any discernable, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

The Tribe relies on *Dubois v. United States Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996) in support of its position. *Dubois* is persuasive authority. *Dubois* involved the use of Loon Pond[9] by a ski resort as a source of water and a repository for disposal of water for its snow making system. The ski resort used water not only from Loon Pond but from another river to make snow. In doing so pollutants were being transferred from the river into Loon Pond. The argument made and rejected in *Dubois* was that the two bodies of water were a "single entity" so there could have been no "addition" of pollutants by the transfer of water from the river to the pond. In *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985), as noted by *Dubois*, the Eleventh Circuit also rejected the "single entity' theory and found a "discharge of a pollutant" in violation of the Clean Water Act where spoil dredged by the propellers of a vessel were deposited on an adjacent sea grass bed.

In this case an addition of pollutants exists because undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, both of which are separate bodies of United States water with a different quality levels. They are two separate bodies of water because the transfer of water or its contents from C-11 into the Everglades would not occur naturally. *Dubois*, 102 F.3d at 1297. That at one time these two bodies of water were hydrologically connected is now

[9] Loon Pond is located in the White Mountain National Forest and is classified as a Class A waterbody protected by demanding water quality standards.



irrelevant and ignores the fundamental direction of water flow factor. *Dubois*, 102 F.3d at 1298.

SFWMD and Poole contend that S-9 is not a point source because it does not create the pollutants discharged into the Everglades. They claim the C-11 canal which contains runoffs from developed lands eastern in Broward county is the pollutants' source. Under the Clean Water Act, § 1362(14), a pipe, such as the three in S-9 is a point source because it discharges pollutants. It is not necessary that the conveyance be the originator of the transferred contaminants. There is no doubt in this case, and it is uncontested by the parties, that S-9 is discharging pollutants into the Everglades. That the pollutants are not formed solely by S-9 is immaterial in a plain reading of the Act.

## Conclusion

The Everglades, which includes the CW 3A and the C-11 canal, are two distinct bodies of water within the meaning of the Clean Water Act even if the waters were hydrologically connected at one time. The seepage from the C-11 canal that SFWMD refers to could not flow naturally from the C-11 canal to the CW 3A and the Everglades. The S-9 pump effects an unnatural flow, transferring polluted water from the C-11 canal through the S-9 pump into relatively pristine Everglades water. Therefore the pump is a point source for which a NPDES permit is required.

**DONE AND ORDERED** in Chambers at Ft. Lauderdale, Florida, this 30th day of September, 1999.

/s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Dione C. Carroll, Esq.
John E. Childe, Esq.
Douglas H. MacLaughlin, Esq.
Perla Sole-Calas, Esq.
Barbara A. Markham, Esq.
Ruth P. Clements, Esq.

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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, and SAMUEL POOLE,

Defendants.
_____/

Case No. 98-6056-CIV-FERGUSON

FRIENDS OF THE EVERGLADES,

Plaintiff,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendant.
_____/

Case No. 98-6057-CIV-FERGUSON

**FINAL SUMMARY JUDGMENT**

(Filed September 30, 1999)

**IN ACCORDANCE** with the Order granting plaintiff's summary judgment [D.E. 60], it is

**ORDERED AND ADJUDGED** that final judgment is hereby entered in favor of the plaintiff enjoining SFWMD from transferring waters from the C-11 canal through the S-9 pump into the Everglades without a NPDES permit. Any pending motions not ruled upon are

rendered moot by this final default judgment. **This case is closed.**

**DONE AND ORDERED** in Chambers at Ft. Lauderdale, Florida, this 30th day of September, 1999.

/s/ Wilkie D Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES
DISTRICT JUDGE

copies provided:
Dione C. Carroll, Esq.
John E. Childe, Esq.
Douglas H. MacLaughlin, Esq.
Perla Sole-Calas, Esq.
Barbara A. Markham, Esq.
Ruth P. Clements, Esq.

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 00-15703-CC

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MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA, SAM POOLE,

Plaintiffs-Appellees,

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendant-Appellant.

---

FRIENDS OF THE EVERGLADES,

Plaintiff-Appellee,

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendant-Appellant.

---

On Appeal from the United States District Court for the
Southern District of Florida

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*ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC*

(Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed Jun. 21, 2002)

Before: EDMONDSON, CHIEF JUDGE, CARNES, Circuit Judge and MUSGRAVE*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE

* Honorable R. Kenton Musgrave, Judge, U.S. Court of International Trade, sitting by designation.



**SUPREME COURT OF THE UNITED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, DC 20543-0001**

**WILLIAM K. SUTER**
CLERK OF THE COURT

AREA CODE 202
479-3011

August 29, 2002

Mr. James E. Nutt
3301 Gun Club Road
West Palm Beach, FL 33406

Re: South Florida Water Management District
v. Miccosukee Tribe of Indians, et al.
Application No. 02A183

Dear Mr. Nutt:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on August 29, 2002, extended the time to and including October 21, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Sandra Elliott Spagnolo
Assistant Clerk

NOTIFICATION LIST

Mr. James E. Nutt
3301 Gun Club Road
West Palm Beach, FL 33406

Mr. Dexter W. Lehtinen
7700 North Kendall Drive
Suite 303
Miami, FL 33156

Mr. John E. Childe
606 Pine Road
Palmyra, PA 17078

Clerk
United States Court of Appeals for
the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303



**33 U.S.C. § 1251 Congressional declaration of goals and policy**

**(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.** The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –

**(1)** it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

* * *

**(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States.** It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

**(g) Authority of States over water.** It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

**33 U.S.C. § 1311. Effluent limitations**

**(a) Illegality of pollutant discharges except in compliance with law.** Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

**33 U.S.C. § 1314. Information and guidelines.**

* * *

**(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution.** The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guide-



lines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from –

* * *

**(F)** changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

* * *

**33 U.S.C. § 1362 Definitions**

Except as otherwise specifically provided, when used in this chapter:

* * *

**(6)** The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .

* * *

**(12)** The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

**(14)** The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

**(16)** The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * *

**(19)** The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

**40 CFR Ch. 1 (7-1-01 Edition)**

**§ 122.2 Definitions.**

* * *

*Discharge* when used without qualification means the "discharge of a pollutant."

*Discharge of a pollutant* means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other



floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

**Fla. Stat. § 403.0885. Establishment of federally approved state National Pollutant Discharge Elimination System (NPDES) Program**

(1) The Legislature finds and declares that it is in the public interest to promote effective and efficient regulation of the discharge of pollutants into waters of the state and eliminate duplication of permitting programs by the United States Environmental Protection agency under s. 402 of the Clean Water Act, Pub. L. No. 92-500, as amended, *33 U.S.C. ss. 1251* et seq, and the department under this chapter. * * *

(2) The department is empowered to establish a state NPDES program in accordance with s. 402 of the Clean Water Act, as amended. The department shall have the power and authority to assume the NPDES permitting program from the United States Environmental Protection Agency and to implement the program, including the general permitting program under *40 C.F.R. s. 122.28* and the pretreatment program under 40 C.F.R. part 403, in

accordance with s. 402(b) of the Clean Water Act, as amended, and 40 C.F.R. part 123. * * * The state NPDES permit shall be the sole permit issued by the state under this chapter regulating the discharge of pollutants or wastes into surface waters within the state for discharges covered by the United States Environmental Protection Agency approved state NPDES program. This legislative authority is intended to be sufficient to enable the department to qualify for delegation of the federal NPDES program to the state and operate such program in accordance with federal law. * * *

**Fla. Admin. Code Ch. 62-620.200 Definitions**
The following words and phrases when used in this chapter shall, unless the context clearly indicates otherwise, have the following meanings: . . .

(12) "Discharge of a pollutant" means any addition of any pollutant or combination of pollutants, as defined in 40 C.F.R. 122.2, to waters from any point source cther than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into the waters from surface runoff which is collected or channeled by man, and discharges through pipes, sewers, or other conveyances which do not lead to a treatment works. This term does not include an addition of pollutants by any indirect discharger.

---



[LOGO]

Department of
Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Jeb Bush
Governor

David B. Struhs
Secretary

22 January 1999

Ms. Barbara A. Markham, General Counsel
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33406

Subject: NPDES Permit for S-9 Pump Station

Dear ~~Ms. Markham~~ Barbara:

This is in response to your letter of November 25, 1998, regarding the S-9 pumping station in Broward County. You requested that the Department provide you with an opinion as to whether the District is required under section 403.0885 of the Florida Statutes to obtain an NPDES permit for the discharge at the S-9 pump station. Upon reviewing the information that you submitted, it is the Department's position that the District is not required to obtain a permit for the S-9 structure for the following reasons.

NPDES Permit Program

The Clean Water Act (CWA) provides that the "discharge of any pollutant by any person" is unlawful. 33 U.S.C. § 1311(a). Notwithstanding this prohibition, the

CWA allows the U.S. Environmental Protection Agency (EPA) or an approved state[1] to issue a permit under the National Pollutant Discharge Elimination System (NPDES) program for the discharge of any pollutant so long as the discharge meets the requirements of the CWA. 33 U.S.C. §1342(a).

The CWA defines a "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Therefore, under the CWA, for an NPDES permit to be required, five elements must be present: (1) a pollutant; (2) must be added; (3) to navigable waters; (4) from; (5) a point source. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

Additionally, the Department's own rule defines the "discharge of a pollutant" in the same manner. Rule 62-620.200 of the Florida Administrative Code defines "discharge of a pollutant" as "any addition of any pollutant or combination of pollutants, as defined in 40 C.F.R. 122.2, to waters from any point source other than a vessel or other floating craft which is being used as a means of transportation." Under the Department's rules, the same five elements must be present for an NPDES permit to be required.

The S-9 pumping station does not meet all five of these elements and therefore, no NPDES permit is needed for this structure.

[1] As you know, EPA has approved the Department's permitting program under section 402(b) of the CWA. Therefore, permits issued by the Department are in lieu of NPDES permits issued by EPA.



"Addition of a Pollutant"

Because the Department does not have any rules defining what is meant by the phrase "addition of a pollutant," we rely on the CWA and the case law interpreting the CWA in defining what is meant by this phrase. There is a long line of case law that has interpreted this phrase to mean that there must be an addition, or an introduction, of a pollutant, and it must be from a point source. *See Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) (Constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass); *Gorsuch*, supra (Addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world); *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) (There is no addition of a pollutant unless the point source discharge physically introduces a pollutant into the water from the outside world).

Based on the information submitted by you, the S-9 pumping station will not be "adding" any pollutants as that phrase is defined by the above-cited cases. There is no evidence that any oils or metals from the pump itself are entering into WCA-3A in any detectable amounts. Thus, this element of the definition is not met.

"From"

EPA's interpretation regarding this element is that ~~that~~ addition of a pollutant must occur "from" a point source and not merely through a point source. *See Gorsuch*, 693 F.2d at 175 n.58. The courts, however, have

treated this element as one requiring causation. *See Dague v. City of Burlington*, 935 F.2d 1343 (2nd Cir. 1991), *rev'd on other grounds*, 112 S.Ct. 2638 (1992) (Where the city's landfill caused pollutants to enter navigable waters, and where those pollutants were then conveyed through a railroad culvert into additional navigable waters, the culvert was a point source under the CWA rendering the city responsible under the CWA).

As you pointed out in your letter, certain pollutants are in the water in the C-11 canal that pass through the S-9 pump station and are discharged into the canal in the WCA-3A. However, the S-9 pump station is not the cause of these pollutants being in the water in the C-11. Rather, the S-9 structure is merely transferring water from one navigable water of the U.S. to another. As such, this element of the definition is not met.

"Point Source"

The term "point source" is defined by the CWA as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). Rule 62-620.200(34), F.A.C., defines the term "point source" in much the same way. The CWA goes on further to define "nonpoint sources of pollution" as pollution resulting from "changes in the movement, flow,



or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." The S-9 pumping station falls within the definition of a nonpoint source of pollution, as that term is used in the CWA, rather than a point source because it is merely changing the movement and flow of a navigable water. Therefore, this element of the definition also is not met.

Additionally, the Sixth Circuit court in *Consumer Power* noted, as in *Gorsuch*, that the NPDES system stands alongside the system of controlling nonpoint sources of pollution and that "Congress apparently intended that problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permitting program. *Consumer Power*, at 587, 588. The S-9 facility is a flow diversion facility and should therefore be regulated by means other than the NPDES permitting program and it is. The Department, pursuant to section 373.4596(9)(k) and (l) of the Florida Statutes, already permits the S-9 pump station. This permit requires that the S-9 pump station discharge meet all state water quality standards no later than December 31, 2006.

Conclusion

Because all five elements of the term "discharge of pollutants" are not met, it is the Department's position that the S-9 pumping structure does not require an NPDES permit for operation.

If you have any questions regarding this determination, please contact either myself at (850) 488-9735 or Jennifer Fitzwater of my office at (850) 921-9611.

Sincerely,

/s/ F. Perry Odom
F. Perry Odom
General Counsel

FPO/jlf

Cc: Ernie Barnett, FDEP
Jerry Brooks, FDEP
Frank Nearhoof, FDEP

Supreme Court, U.S.
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No. 02-626

IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

*v.*

MICCOSUKEE TRIBE OF INDIANS and
FRIENDS OF THE EVERGLADES, INC.,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether certiorari is warranted to review the Eleventh Circuit's ruling that pumping polluted waters without an NPDES permit, against their natural flow and from one distinct body of water to another, violates the Clean Water Act, where such ruling is consistent with decisions of every other circuit that has decided the issue.

2. Whether certiorari is warranted to review the Eleventh Circuit's ruling refusing to give *Chevron* deference to an opinion letter of counsel for a state agency, particularly where the opinion simply reflected such counsel's legal argument based on selected federal cases.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | iv |
| Introduction | 1 |
| Counter Statement | 3 |
| A. Background | 3 |
| B. Decisions Below | 7 |
| C. Applicable Law | 7 |
| Reasons for Denying the Petition | 8 |
| I. There Is No Conflict Among The Circuits On The Issues Decided Below. | 8 |
| A. The Decisions Of The First Circuit In *Dubois* And The Second Circuit In *Catskill* Are Consistent With The Decision Below And There Is No Conflict In The Circuits. | 8 |
| B. The Decisions Of The D.C. Circuit In *Gorsuch* And The Sixth Circuit In *Consumers Power* Do Not Conflict With The Opinion Of The Eleventh Circuit. | 10 |
| II. The Statutory Interpretations Urged By The Petitioner Are Incorrect And Have Been Properly Dismissed By The Lower Courts. | 16 |




*Contents*


| | Page |
|---|---|
| III. The Eleventh Circuit Was Correct In Not Deferring To State Agency Counsel's Legal Opinion Letter In This Case Because Counsel's Legal Argument Concerning Federal Law Is Not Entitled To Deference. | 19 |
| A. EPA's Position Formulated In The Dam Cases Is Not Entitled To Deference Because It Does Not Apply In This Context. | 20 |
| B. No Deference Is Warranted To The Opinion Letter Of The General Counsel Of The Florida Department Of Environmental Protection. | 22 |
| IV. The Petition Should Be Denied, Not Held For *Borden Ranch Partnership v. U.S. Army Corps of Engineers*. | 25 |
| Conclusion | 27 |

## TABLE OF CITED AUTHORITIES


**Cases:** *Page*

*Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) ..... 14, 15, 21

*Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2355 (U.S. June 10, 2002) ..... 25, 26

*Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) ..... 20

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... *passim*

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... i, 6, 19

*Christensen v. Harris County*, 529 U.S. 576 (2000) ..... 23, 25

*Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1990) ..... 17, 18

*Del-Aware Unlimited, Inc. v. Pennsylvania*, 508 A.2d 348 (Pa. 1986) ..... 13

*Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) ..... *passim*

*Environmental Protection Agency v. California*, 426 U.S. 200 (1976) ..... 7







*Page*

*GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999) ..... 22

*National Wildlife Federation v. Consumers Power Co.*, 657 F. Supp. 989 (W.D.Mich 1987) ..... 13

*National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) ..... *passim*

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... *passim*

*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) .... 24

*United States v. Commonwealth of P.R.*, 721 F.2d 832 (1st Cir. 1983) ..... 7

*United States v. Law*, 979 F.2d 977 (4th Cir. 1992) .. 18

*United States v. Mead Corp.*, 533 U.S. 218 (2001) .. 24

*United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) ..... 18

*United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976) ..... 18

*Cited Authorities*


| | *Page* |
|---|---|
| **Statutes:** | |
| P.L. 104-303, § 528(b) | 23 |
| P.L. 104-303, § 528(b)(1)(A)(i) | 6 |
| P.L. 104-303, § 528(e) | 6 |
| P.L. 106-541, § 601(b)(2)(A)(ii)(II) | 6 |
| 33 U.S.C. § 1251, *et seq.* | 2 |
| 33 U.S.C. § 1311(a) | 7 |
| 33 U.S.C. § 1342 | 2, 7 |
| 33 U.S.C. § 1344(a) | 25 |
| 33 U.S.C. § 1344(d) | 25 |
| 33 U.S.C. § 1362 | 4 |
| 33 U.S.C. § 1362(12) | 7 |
| **Code of Federal Regulation:** | |
| 40 C.F.R. § 122.2 | 7 |




No. 02-626

IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner,*

*v.*

MICCOSUKEE TRIBE OF INDIANS and
FRIENDS OF THE EVERGLADES, INC.,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF IN OPPOSITION

Respondents, Miccosukee Tribe of Indians and Friends of the Everglades, Inc., respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the ruling of the United States Court of Appeals for the Eleventh Circuit in this case.

## INTRODUCTION

Respondent Miccosukee Tribe of Indians (the "Tribe") is a federally-recognized Indian Tribe whose members live in the Florida Everglades. Respondent Friends of the Everglades, Inc. ("Friends") is a Florida non-profit corporation, whose members are committed to the protection of the Everglades. The Petitioner

South Florida Water Management District ("SFWMD") is a regional governmental entity which operates and manages a network of pumps, levees and canals in South Florida.

Through one of its facilities, the S-9 pump station, the SFWMD pumps polluted waters, against their natural flow, directly into Water Conservation Area 3A ("WCA-3A"), a vast portion of the Florida Everglades. The Tribe and Friends sued under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("CWA") to enjoin the pumping into WCA-3A and to enforce the provision that requires the SFWMD to obtain a National Pollutant Discharge Elimination System ("NPDES") permit to continue pumping pursuant to 33 U.S.C. § 1342. The district court granted summary judgment for the Tribe and Friends. By stipulation the parties stayed the injunction requiring the SFWMD to stop operating the pumps. The Eleventh Circuit Court of Appeals affirmed the trial court, but ruled that prohibiting the use of the pumps would have been too drastic a remedy. It ordered the SFWMD to obtain the necessary NPDES permit within a reasonable period of time. To date, the SFWMD has not applied for such a permit.

The Petition should be denied because there is no conflict between the circuits. Every circuit that has decided this issue is either consistent with the Eleventh Circuit or considered factually distinguishable situations that have no applicability to the facts here.

Petitioner's argument that the Eleventh Circuit should have deferred to the legal opinion of counsel for Florida Department of Environmental Protection ("DEP") is not worthy of certiorari review because state agencies are generally not entitled to deference when interpreting federal law and more importantly, courts do not defer to the litigating position of state agency counsel. No federal agency has made an interpretation regarding the subject matter of this case.



Petitioner's argument that the public interest demands a less restrictive interpretation of the CWA than that applied by all circuits, including the Eleventh Circuit below, is not an issue worthy of certiorari review either. The public interest, as expressed by Congress in the CWA, requires the conclusion reached by the Eleventh Circuit here, and by every circuit that has decided the issue – that no pollutant be added from point sources into navigable waters without an NPDES permit.

## COUNTER STATEMENT

### A. Background

For generations, the Tribe and its members have lived and worked within the Florida Everglades. The Tribe has land interests lying within the Florida Everglades, including a perpetual lease from the State of Florida to most of WCA-3A. The Tribe's way of life, including their religious, cultural, economic, and historical identity, is dependent upon the natural Everglades ecosystem. This reliance by the Tribe and its members is conditioned upon preservation of the Everglades in its natural state, including but not limited to the quantity and quality of Everglades waters. Petitioner's Appendix ("Pet. App.") 16a.

Friends was founded by Marjory Stoneman Douglas, author of "The Everglades: River of Grass," for the purpose of protecting and restoring the Everglades. There are more than 4,000 members of Friends who use and enjoy the Everglades.

Petitioner, SFWMD, manages the Central & Southern Florida Flood Control Project through the operation of many levees, canals and water impoundment areas. The areas now called the C-11 Basin and WCA-3A were historically part of the Everglades ecosystem. In the early 1900's, the Army Corps of Engineers began digging the C-11 Canal to facilitate the draining of the western portion of Broward County, which is part of the C-11 Basin. Pet. App. 3a.

In the 1950's, the Corps constructed the L-37 and L-33 levees to permanently separate the C-11 Basin from the Everglades to the west, and thus created WCA-3A. If the levees had not been constructed, water would flow as a sheet across WCA-3A and the C-11 Basin in a southerly direction. Pet. App. 3a n.2. Because the levees generally also run North to South, they separated the C-11 Basin and WCA-3A along a natural dividing line. The C-11 Basin and WCA-3A are two separate bodies of water. It has been stipulated below that they each are "navigable waters" of the United States within the meaning of 33 U.S.C. § 1362, CWA. Pet. App. 21a.

The C-11 Canal runs through the C-11 Basin and collects water run-off from within the Basin and some natural seepage through the levees from WCA-3A. Pet. App. 3a. The S-9 pump station, which is the heart of this dispute, pumps this water through three pipes from the C-11 Canal through the L-37 and L-33 levees into WCA-3A to control flooding in Western Broward County. *Id.* The parties do not dispute that but for this pumping by the S-9 pump station, the polluted waters from the C-11 Canal would not flow into WCA-3A. Pet. App. 8a. While Petitioner suggests that some of the waters of C-11 and WCA-3A intermingle,[1] there is nothing in the record to suggest that without the S-9 pump, the polluted water would end up in WCA-3A.[2]

Neither is there any dispute that the waters in the C-11 Canal contain a higher level of pollutants than the natural waters in WCA-3A. Pet. App. 5a. Although the Petition devotes considerable ink and paper to a discussion of non-point source issues, perhaps in an effort to obfuscate the issues, the point-

1. Pet. 10. This suggestion is misleading because, at best, there is some evidence of natural seepage from WCA-3A *into* C-11, but no evidence of seepage in the other direction.

2. Each one of the three pumps can pump 960 cubic feet of water per second.



source status of the S-9 pump is undisputed. *Id.* at 4a–5a. The court below framed the narrow legal issue as "whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source." *Id.* It answered the question affirmatively under the facts of this case.

In order to convince the Court to review the Eleventh Circuit opinion, Petitioner argues that there is a conflict among the circuits regarding what constitutes an addition of pollutants requiring an NPDES permit under the CWA. No such conflict exists among the circuits. The decisions relied on by Petitioner are either consistent with the Eleventh Circuit's opinion or factually distinguishable because they involve "dam[s] and dam-induced water quality changes." The "dam" cases are inapplicable here. Pet. App. 5a n.4.

Petitioner acknowledges, Pet. 3, that *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) are consistent with the decision here. The Eleventh Circuit stated that "[b]oth courts [the First and Second Circuits] emphasized that the two bodies of water were separate and that pollutants would not enter the second body except for the point source." Pet. App. 8a n.7. The conclusions reached by the First and Second Circuits were identical to the conclusions of the Eleventh Circuit in this case and consistent with the language of the CWA. The C-11 Basin and the WCA-3A are two separate bodies of water. The parties stipulated that each is a navigable water and neither disputed that the S-9 pump station, and pipes from which water is released, constitute a point source. Pet. App 4a-5a.

The cases cited by Petitioner as purported conflicts do not indicate any such conflict. The D.C., Fourth and Sixth Circuit cases involve factually distinguishable situations; they concern hydroelectric dams and not water quality changes induced by

facilities such as the S-9 pump station. Pet. App. 5a n.4. Nevertheless, even the tests announced in those cases would lead to the result here.

Petitioner's assertion that applying for an NPDES permit for the S-9 pump station would divert scarce resources from the eight billion dollar Comprehensive Everglades Restoration Project ("CERP"), Pet. 4, is disingenuous. CERP requires that water piped into the Everglades is clean so that the eight billion dollars are not wasted. The Water Resources Development Act of 1996, P.L. 104-303 ("WRDA 96") mandated that the restoration plan being developed must protect water quality and contain a related cost sharing mechanism. P.L. 104-303, §§ 528(b)(1)(A)(i), 528(e). The Water Resources Development Act of 2000, P.L. 106-541 ("WRDA 00") dictates that CERP include features to ensure that "all applicable water quality standards and applicable water quality permitting requirements" are met. P.L. 106-541, § 601(b)(2)(A)(ii)(II).

Petitioner also argues that the courts below should have deferred to the state agency's legal opinion letter. Certiorari is not proper because the Eleventh Circuit applied the correct legal principle: "[a] state agency's interpretation of federal law is generally not entitled to deference by the courts." Pet. App. 6a n.4. Moreover, as the Eleventh Circuit stated, there has been "no instance in which the EPA has extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station." *Id.* As the court further added, "[t]he EPA is no party to this case; we can ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference." The "interpretation" in this case consists primarily of the legal conclusions of the general counsel of a state agency on the meaning of selected federal cases. Pet. App. 45a–47a. Certainly, no deference is due to state agency counsel's interpretation of federal cases. The Petition should be denied because it provides no basis for certiorari review.



## B. Decisions Below

The United States District Court for the Southern District of Florida, and again the Eleventh Circuit on appeal, ruled that the pumping of polluted waters from the S-9 pump station constitutes the addition of pollutants to WCA-3A. Both courts held that the Petitioner is required to obtain an NPDES permit if it wants to continue discharging pollutants into the Everglades. The Petitioner to date has not applied for the permit.[3]

## C. Applicable Law

The CWA prohibits the discharge of pollutants from a point source into navigable waters without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2.

In order to enforce effluent limitations imposed to achieve the CWA's objectives, Congress established the NPDES program. *Environmental Protection Agency v. California*, 426 U.S. 200, 205 (1976); *United States v. Commonwealth of P.R.*, 721 F.2d 832 (1st Cir. 1983). The NPDES program has been called the most important component of the CWA. *Id.* at 834. Under the NPDES program, discharges of pollutants under 33 U.S.C. § 1311(a) are not necessarily prohibited, but they require an NPDES permit.

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3. Although the Petition intimates that applying for an NPDES permit, as directed by the Eleventh Circuit, would be akin to squaring a circle, reality is that NPDES permits can be applied for in due course. Compliance periods under NPDES permits are measured in years. The epic floods of which the Petition warns – both physical and of the lawsuit nature – can be avoided by doing as directed by the District Court and the Eleventh Circuit.

The lower courts in this case ruled that the discharges by the S-9 pump station into WCA-3A are of the type contemplated by the CWA, and that an NPDES permit is required for the continued operation of the S-9 pump station.

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUES DECIDED BELOW.

The ruling below is in harmony with established precedent from other circuits, and the Petition fails to show a conflict among the circuits. The decisions on which Petitioner relies to assert conflict are either consistent with the Eleventh Circuit's decision in this case or factually distinguishable.

#### A. The Decisions Of The First Circuit In *Dubois* And The Second Circuit In *Catskill* Are Consistent With The Decision Below And There Is No Conflict In The Circuits.

Petitioner argues that the Eleventh Circuit's reliance on *Dubois* and *Catskill* conflicts with three other circuits. Petitioner has manufactured a conflict. The Eleventh Circuit's decision, and its reliance on *Dubois*, Pet. App. 28a, is consistent with every circuit that has decided the issue. The First, Second and Eleventh Circuit decisions all involved factual situations where pollutants entered one body of water from a separate body of water.

In *Dubois*, a ski resort corporation proposed to use waters from one body of water, the East Branch of the Pemigewasset River, to make artificial snow and to thereafter discharge left-over water into another body of water, Loon Pond. The Pemigewasset River water contained pollutants, which were thus conveyed through a system of pumps and pipelines into



clean Loon Pond. The trial court found that the CWA did not apply because the Pemigewasset River and Loon Pond were all part of a singular entity – the waters of the United States. The First Circuit in *Dubois* reversed, finding that there was no basis in law or fact for the district court's theory. *Id.* at 1296. It stated,

> [T]he transfer of water or its contents from the East Branch [of the Pemigewasset River] to Loon Pond would not occur naturally. This is more analogous to the example the district court gave from the opposite end of the spectrum: where water is added "from an external source" to the pond and an NPDES permit is required . . . [T]he East Branch is indeed a source "external" to Loon Pond. . . . The district court apparently would reach the same conclusion regardless of how polluted the Pemigewasset was or how pristine Loon Pond was. We do not believe Congress intended such an irrational result.

*Dubois*, 102 F.3d at 1297.

The Eleventh Circuit in this case recognized the logic in *Dubois*, and applied a "but for" test to determine whether the pollutant-laden waters from the C-11 canal would have reached WCA-3A but for the S-9 pump station. Significantly, *Dubois* demonstrates that it is irrelevant whether the pollutants are preexisting when they enter the pipe, pump or canal. What matters is the addition of pollutants to a clean body of water, not whether the pollutants are somehow added to the water by the pipe or pump.

*Catskill* is consistent with *Dubois* and the decision below in this case. *Catskill* involved a reservoir in New York's Catskill Mountains, which stored drinking water for New York City. Water containing minor pollutants was diverted from the reservoir through a tunnel for several miles and then released

into a pristine creek in order to facilitate the delivery of the water to New York City. The court stressed that under normal conditions, the water from the reservoir would never reach the creek. The Second Circuit reversed the trial court's holding and found that the reservoir and tunnel did effect an "addition" to the creek.

*Catskill* illuminates the correctness of the Eleventh Circuit's holding in the instant case. As in *Catskill*, this case deals with a transfer of water containing pollutants from one body of water (C-11 Canal) to another, distinct body of water (WCA-3A), mandating an NPDES permit.[4]

### B. The Decisions Of The D.C. Circuit In *Gorsuch* And The Sixth Circuit In *Consumers Power* Do Not Conflict With The Opinion Of The Eleventh Circuit.

The Second Circuit in *Catskill* reviewed the cases Petitioner relies on to assert a conflict: *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) and found them to be consistent with its own decision. For an "addition" to exist under the CWA, *Gorsuch* and *Consumers Power* required that a "point source must introduce the pollutant into navigable water from the outside world." *Catskill*, 273 F.3d at 491. Provided the "outside world" stands for "any place outside the particular water body to which pollutants are introduced," explained the Second Circuit, its understanding of "addition" was in complete harmony with that of *Gorsuch* and *Consumers Power*. *Id.* "Given that

4. The Petitioner fails to distinguish the instant case from *Catskill*. *See* Pet. 17 n.4. The undisputed fact is that WCA-3A and the C-11 Basin are separate bodies of water – one relatively clean and the other relatively polluted. Petitioner gives no reason why the fact that both waters were connected half a century ago should permit the discharge of pollutants, against the natural flow, from one into the other today.



understanding of 'addition', the transfer of water containing pollutants from one body of water to another, distinct body of water, is plainly an addition and thus a 'discharge' that demands an NPDES permit." *Id.*

Moreover, *Catskill* casts doubt on Petitioner's contention that "[t]he Circuits are sharply divided" in their definitions of "from" and "addition." Pet. 14. *Catskill* discusses the cases cited by the Petitioner for the conflict argument and explains how those cases are in harmony. Neither *Catskill*, nor the Eleventh Circuit below, hold as Petitioner states that "any changes in the natural flow of water that causes polluted water to pass from one water body to another" requires an NPDES permit Pet. 14–15. These circuits apply the precise words of the CWA concerning *point sources* that direct polluted water from one body of water to a distinct and different body of water where pollutants would not have ended up "but for" the change in natural flow. The cases are consistent in interpreting the clear language of the CWA.

The hydroelectric dam cases, *Gorsuch* and *Consumers Power*, fit within the parameters set out by *Dubois* and *Catskill* and confirm – not discredit – the court's ruling below. They are not apposite here because "Congress [has] clearly displayed an intention to exempt dams from the Clean Water Act." *Consumers Power*, 862 F.2d at 586. In *Gorsuch*, the National Wildlife Federation sued the Environmental Protection Agency ("EPA") over the EPA's failure to require operators of hydroelectric dams to obtain an NPDES permit. The National Wildlife Federation claimed that river water captured by a dam becomes "polluted", and that the subsequent discharge of the waters downstream is the addition of pollutants from a point source, requiring NPDES regulation.

The EPA argued that an "addition" from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world. *Gorsuch*, 693 F.2d at 175. In the case of the typical storage dam that holds

water in a reservoir, the EPA argued, there can be no "addition", because the source is not the outside world. *Consumers Power*, 862 F.2d at 584. The D.C. Circuit in *Gorsuch* found that the EPA's interpretation of the CWA was not manifestly unreasonable, and ruled that the discharge from a dam to the river below was not a point-source discharge requiring an NPDES permit. 693 F.2d at 175. As the Eleventh Circuit stated, there is no dispute in this case that the discharge here was from a point source.

Unlike *Dubois*, *Catskill*, and this case, *Gorsuch* "essentially involved the recirculation of water, without anything being added 'from the outside world.'" *Catskill*, 273 F.3d at 491. Nothing was introduced to the river that was not already there. *Id. Gorsuch* did not involve two separate and distinct bodies of water, where pollutants from one are introduced to the other. The water in *Gorsuch* was part of the same rivers at all times. The EPA's ruling that the discharge of the dammed-up water was not tantamount to an "addition" of pollutants was consistent with the test employed by the Eleventh Circuit in this case.

> The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of "addition," assuming that the water from which the discharges came is the same as that to which they go. If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagara Falls.

*Catskill*, 273 F.3d at 492.

The D.C. Circuit in *Gorsuch* concluded that "dam-caused pollution is unique," and emphasized the narrowness of its



decision. *Id.* at 182-83. The S-9 pump station in the instant case is clearly not a dam because dams typically control the flow of water within a single body of water. *See Del-Aware Unlimited, Inc. v. Pennsylvania*, 508 A.2d 348, 381-82 (Pa. 1986) (*Gorsuch* is "distinguishable because it dealt with a single body of water"). *Consumers Power* defines a dam as "any structure that impounds water." *Id.* at 590. No one can argue that the S-9 pump station at issue here is a dam. The "dam" cases are factually distinguishable and Petitioner improperly uses these cases to attempt to create a conflict.

Yet, even considering the unique nature of cases involving dams, the decision in *Gorsuch* is in complete harmony with that of the Eleventh Circuit in this case. In *Gorsuch*, no "addition" occurred because the polluted dam-waters stayed within the same body of water – the rivers where they would have ended up without the dam. In the present case, an "addition" did occur because the polluted canal waters were pumped into a separate body of water, WCA-3A, where they would not have ended up but for the discharge.

*Consumers Power* involved a power plant on the shores of Lake Michigan. The power company had "withdrawn water from [the lake], along with some surprised fish, for hydro-electric power generation. The water and fish were then returned to the Lake after passing through hydroelectric generators, which pureed some of the fish." *Catskill*, 273 F.3d at 491. The Sixth Circuit in *Consumers Power* found that returning the fish to the Lake, albeit in a different form, was not an "addition" because the fish already existed there. 862 F.2d at 585; *see also Catskill*, 273 F.3d at 491. The Sixth Circuit held that it could not distinguish the dam[5] used to store the Lake Michigan waters from the dams in *Gorsuch*. 862 F.2d at 585.

5. The District Court in *Consumers Power* implicitly acknowledged that the storage reservoir used by the facility was a "dam." *National Wildlife Fed'n v. Consumers Power Co.*, 657 F. Supp. 989, 1008 (W.D.Mich 1987); *Consumers Power*, 862 F.2d at 589.

As in *Gorsuch* (but unlike *Dubois*, *Catskill* and the instant case) the water in *Consumers Power* was recirculated and returned to the same body of navigable water from whence it came. The Sixth Circuit therefore concluded that the releases from the hydropower plant were not introduced from the outside world and that no NPDES permit was required. *Id.* at 586; *Catskill*, 273 F.3d at 492.

The Eleventh Circuit clearly recognized the distinction between the case at hand and the dam cases. In *Gorsuch*, the District of Columbia Court of Appeals gave deference to EPA's position that a dam did not add pollutants from the outside world and, thus, no NPDES permit was required for a dam to release the water into a downstream river. *Id.* at 174-75. Pet. App. 5a n.4.

Petitioner cannot use the dam cases to invoke certiorari jurisdiction based on inter-circuit conflict. No "addition" occurred in these cases because the alleged pollutants stayed in the same body of water where they would have ended up even without the pumping. In the instant case, an "addition" did occur because the polluted canal waters were pumped into a separate body of water, WCA-3A, where they would not have ended up but for the discharge. Pet. App. 7a. Thus, the dam cases are factually distinguishable and do not support certiorari based on conflict.

The Petitioner also relies on the Fourth Circuit case of *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976), a case that focused on regulations establishing limitations on the discharge of heat from steam electric generating plants into navigable waters, a factual scenario similar to the dam cases. The Fourth Circuit discussed various cooling methods for power plants, all of which involved the taking of water from a lake or pond for cooling and subsequent return of the water to the same cooling lake or pond. *Id.* at 1357-58. The Fourth Circuit found



that the Federal Water Pollution Control Act did not require that power plants remove pre-existing pollutants before they return them to the navigable water where they originally came from.

While *Appalachian Power* discusses addition of pollutants under the CWA only as a side-issue in its comparison of various cooling methods for steam electric plants, the case nevertheless demonstrates the consistency with which the circuits have dealt with the addition requirement over the years. It demonstrates the correctness and internal consistency of *Dubois*, *Catskill*, *Gorsuch*, *Consumers Power*, and the decision here. What Petitioner calls the "Traditional Addition Test" is nothing but an early expression of the test employed by the Eleventh Circuit in this case. In its brief discussion of what constitutes an addition of pollutants under the Act, the Fourth Circuit confirmed that the Act is concerned with discharges of pollutants into navigable waters that did not already contain these pollutants. The discharge of polluted water from the C-11 Basin into WCA-3A constitutes an 'addition" under the Fourth Circuit Test in *Appalachian Power*.

The district court and the circuit court in this case, the First Circuit in *Dubois*, and the Second Circuit in *Catskill* did not, as Petitioner suggests, misinterpret the addition requirement of the CWA, ignore congressional intent, eviscerate jurisdictional requirements, or otherwise fail to understand the law. They followed established precedent, including *Gorsuch* and *Consumers Power*. The SFWMD would be required to obtain an NPDES permit in the Fourth, Sixth and D.C. Circuits because the SFWMD's discharges add pollutants to a separate body of water.

No conflict has been shown in the Circuits. The Petition should be denied.

## II. THE STATUTORY INTERPRETATIONS URGED BY THE PETITIONER ARE INCORRECT AND HAVE BEEN PROPERLY DISMISSED BY THE LOWER COURTS.

The Petitioner's entire discussion of legal precedent and the court's ruling below contains an incorrect interpretation of the CWA. The Petitioner argues that the discharge at issue in this case does not require an NPDES permit because the S-9 pump station "adds nothing to the water it pumps." Pet. 1. Petitioner contends that it "adds" nothing to the water because it only pumps water containing pollutants from other sources in Broward County.

The Petition states that: "[t]he fundamental issue in this case is whether a state water management agency may pump water, to which it adds nothing, from one side of a levee to the other without the need for a federal National Pollutant Discharge Elimination System . . . permit. . . ." Pet. 1–2. As the Eleventh Circuit explained, the addition requirement of the CWA focuses on the receiving body of water, and not on the water as it is being pumped. Pet. App. 6a. This interpretation of the CWA is not, as Petitioner argues, expansive. It is logical, in harmony with decisions in other circuits, and is consistent with the CWA.

The Petitioner's arguments lead to illogical results under the CWA. Petitioner reaches conclusions only by distorting the language of the *Gorsuch* and *Consumers Power* cases in order to manufacture an alleged conflict. Moreover, the issues as framed by the Petitioner mischaracterize the factual premise of this dispute by ignoring that this case deals with two separate bodies of water.

The Eleventh Circuit affirmed the trial court's holding that "for an addition of pollutants to be *from* a point source, the relevant inquiry is whether – but for the point source – the



pollutants would have been added to the receiving body of water." Pet. App. 7a (emphasis added). The Eleventh Circuit expressly rejected the Petitioner's interpretation that in order to be "from" a point source, the point source itself (the pump in this case), must have added the pollutants to the water. The Eleventh's Circuit's conclusions are consistent with the requirements of the CWA as is the Second Circuit's opinion in *Catskill*:

> a pipe, ditch, channel, tunnel, or conduit is unlikely to have created the pollutants that it releases, but rather transports them from their original source to the destination water body. . . . The tunnel itself need not have created the pollution; it is enough that it conveys the pollutants from their original source to the navigable water.

273 F.3d at 493.

To use the Second Circuit's words, the view advanced by the Petitioner "misunderstands the import of the term 'point source,' which does not necessarily refer to the place where the pollutant was created but rather refers only to the proximate source from which the pollutant is directly introduced into the destination water body." *Id.* at 493. Under Petitioner's view of the CWA, scores of cases where the point source itself did not add any pollutants to the water it conveyed are suddenly erroneous. In the Petitoner's world, a perfectly engineered pipe draining pollutants from a landfill while adding nothing to the water it conveys, can pollute a pristine body of water with impunity.

The Second Circuit has debunked that argument in *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1990), where run-off from a landfill flowed through a railroad culvert into a wetland area. The City of Burlington, Vermont, had denied that

the culvert was a point source for the addition of pollutants because the pollutants had entered the waters of the United States before they flowed through the culvert. The Second Circuit rejected the view that an addition only occurs when pollutants are introduced into navigable waters for the first time. Instead the court focused on whether the railroad culvert ultimately conveyed the pollutants into the wetlands. *Id.* at 1355; *see also United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) (waste materials that collected in a ditch and from there entered navigable waters constitute an addition from a point source); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976) (rejecting view that pollutants must be discharged directly into navigable waters). *Dague* also demonstrates that traditional local water management is not exempt from the mandates of the CWA as the Petition suggests.

The Fourth Circuit in *United States v. Law*, 979 F.2d 977 (4th Cir. 1992) stressed that the origin of pollutants in CWA cases is irrelevant. The proper focus is upon the discharge from the ponds into the receiving body of water. *Id.* at 979. Likewise, the Eleventh Circuit correctly rejected the Petitioner's argument that it is not subject to the NPDES requirement in the CWA because it did not "add" anything to the waters it pumped.[6] The court agreed that the receiving body of water, WCA-3A, rather than the water being pumped, is the relevant water under the CWA. Pet. App. 6a. The CWA focuses on "additions" to "navigable waters," not to the fungible liquid as the Petitioner suggests.

The Petitioner's warning that the Eleventh Circuit's ruling is so expansive "that it is difficult to imagine any significant state or municipal water management system that would not require federal permitting" rings hollow. Pet. 4. According to

6. Petitioner relies on Webster's Dictionary – Unabridged, rather than 30 years of jurisprudence, to define "addition."



the Petitioner's reading of the CWA, the Court should have interpreted the CWA so restrictively that it is difficult to imagine any significant pipe or pump discharging pollutants that would require federal permitting. The "hundreds of thousands" of water control structures "operating illegally" under the Eleventh Circuit decision do not exist in the record below or in reality. Pet. 24.

The Petition fails to show any conflicts in the courts and should be rejected on that basis. The Eleventh Circuit found that the fact that "the pollutants are not formed solely by S-9 is immaterial in a plain reading of the act." This interpretation is consistent with the CWA and the applicable case law from all circuits. *See* Pet. App. 29a.

## III. THE ELEVENTH CIRCUIT WAS CORRECT IN NOT DEFERRING TO STATE AGENCY COUNSEL'S LEGAL OPINION LETTER IN THIS CASE BECAUSE COUNSEL'S LEGAL ARGUMENT CONCERNING FEDERAL LAW IS NOT ENTITLED TO DEFERENCE.

In misplaced reliance on *Gorsuch* and *Consumers Power*, the Petitioner argues it should have prevailed because the Eleventh Circuit should have given *Chevron* deference[7] to what Petitioner asserts was EPA's position that no NPDES permit is required for the operation of the S-9 pump. However, EPA has never taken a position in this case.[8]

7. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("[I]f Congress has explicitly left a gap for the agency to fill, there is an expressed delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

8. The EPA has not intervened, has not filed *amicus curiae* briefs, and has not provided affidavit testimony or other support for the position asserted by Petitioner.

The Petition concedes that there is no express agency position by the EPA with respect to the S-9 pump station, or any similar facilities for that matter, but laconically states that "formal written agency action . . . would not be expected." Pet. 26. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988), requires that no deference be given to agency counsel's litigating position.

Petitioner's argument concerning the EPA's position relies on two questionable bases: old and inapplicable EPA statements unique to dam-cases, and an opinion letter by the General Counsel for Florida's DEP, based on that counsel's interpretation of selected federal cases, that no NPDES permit was required in this case. Pet. 12.

### A. EPA's Position Formulated In The Dam Cases Is Not Entitled To Deference Because It Does Not Apply In This Context.

The Eleventh Circuit in the instant case declined to let the alleged EPA position affect its ruling because Petitioner could not point to any instances where the EPA had extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station. Pet. App. 5a–6a n.4. "The EPA is no party to this case; we can ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference." *Id.*

The Eleventh Circuit correctly declined to give any deference to the EPA's agency position taken in briefs filed decades ago in the *Gorsuch* and *Consumers Power* dam cases. To understand the irrelevance of the EPA's agency position in *Gorsuch* in the context of this case, it helps to consider the genesis of deference to the EPA's position in CWA discharge cases. The concept was first applied in *Gorsuch*, where the EPA was the primary defendant. *Gorsuch* discussed



the issue of pollutant discharges from hydroelectric dams generically, rather than any specific dam. The EPA had studied how discharges from dams in general should be treated and took an official agency position, contemporaneously with the passage of the Clean Water Act. 693 F.2d at 167. *Gorsuch* stressed that contemporaneous construction and subsequent consistency increase the amount of deference to be given to an agency's interpretation. *Id.* at 167 n.31. This assures the integrity of the process: agency positions taken *ad hoc* to attain a desired result in a given case are not entitled to deference, while positions that are taken generically, contemporaneously with the passage of the interpreted law, and subsequent consistent positions, deserve the deference afforded by the D.C. Circuit in *Gorsuch*. Yet, the D.C. Circuit in *Gorsuch* gave deference only after ensuring that the EPA's position was not manifestly unreasonable. More importantly, it emphasized the narrowness of its decision.

Because *Consumers Power* was also a dam case, and the EPA remained consistent with its earlier position concerning dams, the Sixth Circuit also gave deference to the EPA's position in the *Consumers Power* case (the EPA had filed an *amicus curiae* brief). However, in *Appalachian Power*, upon which the Petition relies heavily, the Fourth Circuit rejected the EPA's position on various issues.

Later still, in *Catskill*, the Second Circuit questioned how much deference should have been afforded to the EPA's position in the *Gorsuch* and *Consumers Power* cases, given the fact that the EPA's original position had not been adopted in a rulemaking or other formal proceeding. The issue proved to be irrelevant in *Catskill* for two reasons. First, *Catskill* was not a dam case. The EPA's addition test for the CWA was formulated expressly for dam cases and not for "separate bodies of water" cases. Secondly, the *Catskill* court found

that the EPA's addition test would have led to the correct result. An addition of pollutants from the outside world did take place in *Catskill* and an NPDES permit was required.

Similarly, it would not have mattered if the court in this case had applied the EPA's addition test set forth in *Gorsuch*. The outcome would have been the same. Pollutants from the outside world are being added by the S-9 pump station to WCA-3A, and an NPDES permit is required.

### B. No Deference Is Warranted To The Opinion Letter Of The General Counsel Of The Florida Department Of Environmental Protection.

Petitioner's second argument asks for certiorari review based on alleged lack of deference to a state agency position. The court below stated the correct legal principle that a state agency's interpretation of federal law is generally not entitled to deference. Pet. App. 6a n.4. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999). Moreover, petitioner misrepresents what it claims is entitled to deference. The deference argument is based upon an opinion letter by the General Counsel for Florida's Department of Environmental Protection. Pet. App. 43a–48a. The letter was, according to its own words, written in response to a November 25, 1998 request of the Petitioner, who by then had been embroiled in this litigation for more than 10 months. It is an agency position taken *ad hoc* to attain a desired result.

DEP General Counsel's opinion is not the opinion of the EPA. Yet, the Petition imputes DEP Counsel's opinion to the EPA. *See, e.g.*, Pet. 13. Thus, the opinion letter of an attorney for a state agency, interpreting selected federal laws has morphed in the Petition into the official position of an agency of the United States of America and, according to Petitioner, should have been decisive in this case.



Although Florida's DEP was authorized by the Florida Legislature to establish a state NPDES program in accordance with the CWA, DEP never was given the authority to formulate official agency positions for the EPA.[9] Moreover, the suggestion that general counsel of the DEP should be the proverbial tail to wag the dog, deciding in place of the EPA and numerous federal circuits what the CWA means, is not consistent with any decision of this Court or any circuit. Nothing in the concept of cooperative federalism requires delegation of the ultimate power to interpret federal law to the general counsel of Florida's Department of Environmental Protection. A self-serving opinion letter created during the course of litigation does not satisfy any requirement of deference. The six-page cursory discussion of selected cases is entitled to no deference whatsoever because it is simply legal argument. Pet. App. 6a n.4.

The Petition's reliance on the DEP Opinion Letter ignores cases suggesting that agency positions in opinion letters do not deserve any sort of deference. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference"). Even if a state agency's interpretation of federal law were entitled to any deference by the courts, the DEP opinion letter in this case was not persuasive and was properly rejected by the Eleventh Circuit. Its interpretation of federal law was based entirely upon the dam cases.

Petitioner readily admits that the weight that should be accorded to the DEP counsel's opinion letter must depend

9. The Petitioner also appears to be uncertain about the distribution of authority in the actual restoration process of the Everglades. It incorrectly states at Pet. 11 that § 528(b) of WRDA 96, directs the South Florida Ecosystem Restoration Task Force to develop a comprehensive plan to restore, preserve and protect the Everglades and its water quality. That duty is reserved to the Secretary of the Army. *Id.*

(a) upon the thoroughness evident in its consideration, (b) the validity of its reasoning, (c) its consistency with earlier and later pronouncements, and (d) all those factors that give it power to persuade, if lacking power to control. Pet. 24–25, relying on *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That analysis is very instructive in this case. The Petitioner cannot even meet its own test:

(a) The opinion letter is anything but thorough, neglecting to even consider *Dubois* and *Catskill*, which Petitioner now admits are relevant to the issue.

(b) The validity of its reasoning is suspect, having relied solely on dam cases which are "unique" and involve structures that are "exempt from the Clean Water Act". *Gorsuch*, 693 F.2d at 182; *Consumers Power*, 862 F.2d at 586.

(c) The opinion letter at issue was written at the request of the SFWMD after litigation commenced. If earlier pronouncements had existed, the SFWMD would not have had to enlist the help of the DEP's general counsel. Accordingly there are no consistent earlier or later pronouncements.

(d) Given the fact that DEP ostensibly lacks the power to control the issue, only factors that give the DEP's counsel power to persuade are relevant. One such factor, as the *Gorsuch* court pointed out, is whether the agency position was formulated contemporaneously with the law being interpreted. That is not the case here. The alleged agency interpretation by the DEP was formulated decades after the law it interprets and, more importantly, approximately one year after inception of this case.



Another important factor is whether the agency position has been adopted in a rulemaking or other formal proceeding. *Catskill*, 273 F.3d at 490; *see also Christensen*, 529 U.S. at 587. Again, the opinion letter fails.

Petitioner's argument urging deference to a non-existing position of a federal agency (EPA) and an irrelevant position of a state agency (DEP) is not a proper basis for this Court to grant certiorari review.

## IV. THE PETITION SHOULD BE DENIED, NOT HELD FOR *BORDEN RANCH PARTNERSHIP v. U.S. ARMY CORPS OF ENGINEERS.*

The Court has accepted certiorari review in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2355 (U.S. June 10, 2002) (No. 01-1243). *Borden Ranch* involves the excavation and redepositing of materials in a wetland area, and requires consideration of Section 404 dredge and fill permit issues, 33 U.S.C. §§ 1344(a), (d), which are administered by the United States Army Corps of Engineers. *Id.* at 814.

Unlike *Borden Ranch*, the instant case involves permits for point source discharges pursuant to Section 402 of the CWA, which are administered by the EPA. While some definitions under the CWA may pertain to both Section 404 dredge and fill cases and to Section 402 point source discharge cases, the two sections concern very different factual situations and the application of the definitions varies a great deal between the two.

The primary issue in *Borden Ranch* is whether naturally occurring substances become pollutants once they are dredged and redeposited in the same location. The primary issue in this

case is whether an NPDES permit is required when adding pollutants from a point source to another body of water where the pollutants would not have otherwise ended up.

While there may be variation among the courts concerning the administration of Section 404 dredge and fill permits, the decisions on Section 402 point source discharge cases are in harmony. The ultimate decision by this Court in *Borden Ranch* will not disturb that harmony. Therefore, the Court should deny certiorari, and should not hold the Petition.



## CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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In The

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF

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TABLE OF CONTENTS


| | | Page |
|---|---|---|
| 1. | The Inter-Circuit Conflict Is Clear And Cannot Be Reconciled | 2 |
| 2. | Deference Is Proper In This Case | 6 |
| 3. | Respondents Fail To Recognize That The NPDES Was Intended To Regulate Those Sources From Where Pollutants Originate | 7 |
| 4. | Respondents Fail To Address The Propriety Of The Non-Point Source Programs To Regulate The Petitioner's Water Management Operations | 9 |

## TABLE OF AUTHORITIES

Page

CASES:

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001) ..... 2, 3, 5

*Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1990) ..... 8

*Dubois v. U.S. Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 1996) ..... 3, 5

*National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) ..... *passim*

*National Wildlife Federation v. Gorsuch, Admin., U.S. Environmental Protection Agency*, 693 F.2d 156 (D.C. Cir. 1982) ..... *passim*

*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ..... 7

*United States v. Law*, 979 F.2d 977 (4th Cir. 1992) ..... 7, 8

*United States v. Mead Corp.*, 533 U.S. 218 (2001) ..... 7

*United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) ..... 8

*United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W. D. Tenn. 1976) ..... 8

STATUTES & REGULATIONS:

33 U.S.C. § 1288 ..... 9

33 U.S.C. § 1313(e)&(d) ..... 9

33 U.S.C. § 1314(f)(2)(F) ..... 5, 9

33 U.S.C. § 1329 ..... 9

S. Rep. No. 95-370, 1977 ..... 9



## REPLY BRIEF

The court of appeals has vastly expanded the reach of the NPDES program by requiring the petitioner and by extension thousands of water managers nationwide, to enroll its water diversion facilities in the NPDES permit program. Fifteen amici have joined in five briefs urging this Court to grant certiorari. These briefs, filed by organizations representing hundreds of interests across the nation as diverse as states, municipalities, agriculture, sewerage agencies, water suppliers, flood and stormwater managers, drainage districts, private landowners and private foundations attest to the critical importance of the issues presented in the Petition.

Contrary to respondents' assertion – and as the extraordinary range of amici submissions demonstrate – the petitioner has not exaggerated the reach of the court of appeals' decision in this case or the depth of inter-circuit conflict that has developed.

As the amici point out, everyone having to manage water from governmental agencies to private landowners use dams, ditches, canals, levees, pumps and other diversion facilities to separate and divert water. The court of appeals has transformed these traditional water management activities into "discharges of pollutants" which are subject to an intricate and extremely burdensome scheme of federal regulation and criminal penalties. Local water managers and farmers, operating with scarce resources, are in no position to absorb the significant costs thrust upon them by the lower courts. No wonder the numerous amici maintain that the decision in this case threatens their ability to provide the public and themselves with vital flood protection and sufficient water supply. The

petitioner is particularly concerned with maintaining the operational flexibility needed to deal with Florida's ever changing hydrological conditions brought by hurricanes, seasonal cycles and droughts. Respondents do not deny the importance of this case or the questions presented.

### 1. The Inter-Circuit Conflict Is Clear And Cannot Be Reconciled.

Respondents mischaracterize *National Wildlife Federation v. Gorsuch, Admin., U.S. Environmental Protection Agency*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) in their attempt to mask the inter-circuit conflict pointed out in the Petition. For example, the respondents incorporate the 2nd Circuit's contention that *Catskill* is in "harmony" with *Gorsuch* and *Consumers Power* "provided the 'outside world' includes other navigable waters." Opp. at 10, quoting *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001).[1] The fact remains that *Gorsuch* and *Consumers Power* do not consider the "outside world" to include other navigable water bodies. See *Gorsuch*, at 175; *Consumers Power* at 585. In both cases, EPA argued that "an addition from a point source occurs only if the point source itself physically introduces a pollutant into

[1] The 11th Circuit similarly extended the phrase "outside world" to include "other navigable water bodies," but without any pretense of harmony between the circuits. Pet. 6a n.5. The 11th Circuit's opinion that another navigable water body, to which nothing is added, can be a source of pollutants as compared with the 6th and D.C. Circuit's "addition" test illustrates the very conflict this Court is being asked to resolve.



the water from the outside world." *Gorsuch* at 175. The D.C. and 6th Circuits agreed that passing polluted water from one navigable water body (the reservoir or impoundment areas) into another (the river or lake) was not an "addition" of pollutants into the navigable waters from the point source through which they pass. *Id.* Thus, the D.C. and 6th Circuits did not consider the transfer of pre-existing pollutants that are added from another water body to trigger NPDES because they were not from the "outside world." The 1st, 2nd and 11th Circuits, on the other hand, consider the mere transfer of pre-existing pollutants between water bodies to require NPDES permitting. Therein lies the clear conflict.

This inter-circuit conflict also is manifest in the Eleventh Circuit's declaration that the "relevant body of water is the receiving body of water." Pet. 6a. In both *Consumers Power* and *Gorsuch*, pollutants were transferred into the "receiving" water body, yet no permit was required. The D.C. and 6th Circuits explained that if Congress intended NPDES to apply to "all pollutants released through a point source" it could have easily chosen suitable language, but instead it chose to limit NPDES to the "addition" of pollutants "from" a "point source." *Gorsuch*, at 176; *Consumers Power*, at 586. By changing focus to the "receiving water body," as opposed to the navigable waters as a whole, the 1st, 2nd and 11th Circuits have greatly expanded the NPDES program to include hundreds of thousands of water management activities. Thus, the 11th Circuit's "but for" test squarely conflicts with the D.C. and 6th Circuit's adherence to EPA's traditional "addition" test.

Respondents also mistakenly claim that this case is factually similar to *Dubois* and *Catskill*, because they

involve the movement of water between "separate and distinct" water bodies and, in turn, that it is distinct from *Gorsuch* and *Consumers Power* because they involve the movement of waters within the "same" water body. Opp. 12-13. As discussed below, neither characterization is accurate or relevant.

Contrary to respondents' contention that this case involves "separate and distinct" water bodies, the 11th Circuit noted that the waters of the C-11 Basin and the WCA-3A naturally "intermingled" and are essentially a "single body of navigable water." Pet. at 8a n.8. Understanding that the waters involved in this case are all part of the same natural water body, separated only by the very water control system that is being challenged, this matter cannot be fairly distinguished from *Gorsuch* or *Consumers Power* as attempted by the respondents. The waters managed by S-9 are in fact no more or less "separate" or "distinct" then the reservoir was from the river in *Gorsuch* or the impoundments were from the lake in *Consumers Power*. The L-31 and L-37 levees operate as a dam to create the WCA-3A impoundment area. See Pet. 3a.[2]

[2] Also unpersuasive is the respondents and the 11th Circuit's attempt to limit the *Gorsuch* addition test to hydropower dams. Opp. at 5 & 11, Pet. 6a n.4. As *Consumers Power* noted when applying the traditional addition test to vast impoundment areas carved out of a lake side by a series of levees, the test adopted by *Gorsuch* is neither expressly nor logically limited to dams. *Consumers Power*, at 583. Moreover, dams are defined under federal law as any structure that impounds water. *Consumers Power*, at 590. The levees in both *Consumers Power* and this matter perform that very basic water management function.



Equally unpersuasive is the respondents' attempt to align this case with *Dubois* and *Catskill*. The 1st and 2nd Circuits distinguished *Gorsuch* and *Consumers Power* by noting that the water bodies in *Dubois* and *Catskill* would, but for the point source, never naturally[3] intermingle. That distinction cannot be made in this case, which like *Gorsuch* and *Consumers Power*, presents the opposite situation where water control structures prevent the water from intermingling as one water body.

Moreover, the respondents' reliance upon these factual distinctions is misplaced. All five cases, *Dubois, Catskill, Gorsuch, Consumers Power*, and this matter, involve the transfer of water from one water body to another, whether naturally or artificially separated. The broad tests enunciated in these cases, whether the traditional "addition" test or the expansive "but for" test, are neither expressly nor logically limited by the historic relationship between the waters. Certainly, the 6th and D.C. Circuits treated the reservoir, river, lake and impoundment area as separate water bodies in the same way the 11th Circuit treated the C-11 basin and the WCA-3A impoundment area.

Thus, under the Eleventh Circuit's "but for" test, it is irrelevant whether the waters being diverted were

[3] Without explaining its relevance, the Eleventh Circuit, District Court and respondents note that the S-9 "changes the natural flow of a body of water." See Pet. 7a, Opp. 2. All point sources, however, by their very nature divert water away from their "natural flow." Recognizing pollution often results from such activities, Congress specifically directed EPA to develop non-point source guidelines to address such changes to the flow and movement of water. 33 U.S.C. §1314(f)(2)(F). Amazingly, respondents made not even a reference to that statutory directive.

naturally one or not. The "but for" test applies to the diversion of water from one water body into another, regardless whether they were originally part of the same water body. The "addition" test, on the other hand, excludes water diversions from the NPDES program unless something is added by the point source. These tests, which have distinctly collided in this case, cannot be reconciled as respondents have argued and have incredibly broad ramifications as pointed out by the amici representing thousands of concerned citizens nationwide.

**2. Deference Is Proper In This Case.**

As also noted by the amici in this case, EPA and its cooperating state partners do not require NPDES permits for the millions of water control structures nationwide that, like the S-9 facility, merely divert water without introducing pollutants. See e.g. NCY Brief at 2. Respondents do not contend that EPA and DEP believes that the S-9 has been operating illegally. Nor is there any disagreement that EPA and DEP exercise strict regulatory oversight over the petitioner. The state and federal governments have jointly striven to address the water quality changes created by S-9 and the petitioner's numerous other structures throughout south Florida under alternative state programs. Respondents miss the point, by a mile, that it is the agencies' longstanding and consistent practices and policies, described more fully in the Petition, that are entitled to at least some judicial deference.

Respondents instead focus myopically upon only the formal written positions expressed in *Gorsuch* and *Consumers Power* and the position letter issued by DEP's general counsel. In doing so, they concede the applicability



of *Mead* and *Skidmore* (Opp. at 24), yet fail to give appropriate weight to those and many other circumstances that render the agencies' position persuasive. For example, the respondents completely ignore the historic development of the alternative state permitting regime under which the S-9 operates.

Respondents also mischaracterize the positions taken by EPA in *Gorsuch* and *Consumers Power* and by DEP's general counsel as mere litigating positions. Neither DEP nor EPA has been party to this or any other CWA litigation involving the petitioner's structures. These position statements, rather, reflect and explain the regulatory agencies' position and policies toward the application of NPDES to water management facilities, not their defensive litigating posture. The *Gorsuch* and *Consumers Power* opinions present a detailed analysis of the agencies' position and the intent of Congress to divide responsibility for water pollution between the states, develop a strong cooperative federalism scheme and to leave the regulation of traditional water management to areawide, watershed planning programs rather than the NPDES program.

Under the totality of these circumstances, the 11th Circuit's cursory and complete denial of any deference to the administrative agencies that have been implementing CWA policy for over thirty years was improper.

**3. Respondents Fail To Recognize That The NPDES Was Intended To Regulate Those Sources From Where Pollutants Originate.**

Respondents' misconception that it does not matter from where the pollutants originate is reflected in their completely misguided contention that *United States v.*

*Law*, 979 F.2d 977 (4th Cir. 1992), "stressed the origin of pollutants in CWA cases is irrelevant." Opp. 18. That case stands for the completely opposite proposition. In *Law*, the appellant also argued under *Gorsuch* and *Consumers Power* that it was not responsible for merely diverting the flow of pre-pollutants. *Law* at 979. The 4th Circuit acknowledged the inaccuracy of a jury instruction that denied the defense that all of the pollutants being transferred "originated" from somewhere other than the defendant's property. *Id.* This error was harmless, however, because the pollutants were being transferred into the navigable waters from "a treatment system that was, as a matter of law, not part of the navigable waters." *Id.* at 980. Thus, the key to liability under *Law* was that, unlike this case, some pollutants were added by the point source from outside the navigable waters. *Id.* at 980. Properly understood, *Law* strongly supports the petitioner's contention that the pollutants must indeed originate from the point source before the NPDES program is triggered.

Respondents also misrepresent that there are "scores of cases where the point source itself did not add pollutants to any of the waters it conveyed. . . . " Opp. 17. The few cases cited for this proposition are inapposite. For example, *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1990) required the city to attain an NPDES permit for pollutants originating from its landfill. Both *United States v. Ottati & Gross, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) and *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976) involve criminal actions against those from which pollutants originated. Each of those cases are inapposite because they hold those sources from which pollutants originate responsible under NPDES. In this case, to the contrary, the petitioner has been improperly



held responsible for all of the pollutants that originate from other sources. These cases simply do not support the 11th Circuit's expansion of the NPDES program to water managers that have not introduced any pollutants into the waters.

### 4. Respondents Fail To Address The Propriety Of The Non-Point Source Programs To Regulate The Petitioner's Water Management Operations.

Finally, Respondents fail to say anything at all about the damage done by the 11th Circuit's decision to the CWA's careful apportionment of regulatory responsibilities between the federal and state governments. In fact, they do not so much as mention §§ 208 (33 U.S.C. § 1288), 303(e)&(d) (33 U.S.C. §§ 1313(e)&(d)) and 319 (33 U.S.C. § 1329) of the CWA, which assign to the states regulatory authority over non-point sources of pollution and § 304(f)(2)(F) (33 U.S.C. § 1314(f)(2)(F), which clearly contemplates pollution caused by flow diversions to be addressed through non-point source programs. The CWA amendments were expressly intended to encourage "the State[s] to assume more and more of the responsibilities of the water pollution program." S. Rep. No. 95-370, 1977 U.S.C.C.A.N. at 4357. The amici make clear, however, that the 11th Circuit has thrown a wrench into traditional water management and has widely encroached upon what was up until this case a respected state preserve.

By redefining the term "addition" to encompass routine water transfers, the court of appeals has all but gutted the alternative, state based regulatory scheme designed to address pollution caused by the diversion of water set forth in §§ 208, 303(d)&(e), 304(f)(2)(F), and 319 of the CWA. As emphasized by the amici, water managers

never before expected to enroll in the NPDES program will now have to seek federal permits for what are routine transfers of water between various watersheds and basins throughout the nation regulated for the first thirty years of the CWA under its state programs.

For these reasons as well as those contained in the five amici briefs filed in this case, Petitioner requests this Court to grant the requested writ of certiorari.

Respectfully submitted,

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# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## SUPPLEMENTAL BRIEF

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## TABLE OF AUTHORITIES

Page

CASES:

*AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. 366 (1999) .....10

*Borden Ranch Partnership* v. *U.S. Army Corps of Engineers*, 537 U.S. 99 (2002)..... 5

*Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481 (2d Cir. 2001)..... 9

*Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003) .....2, 4

*Dubois* v. *U. S. Dept. of Ag.*, 102 F.3d 1273 (1st Cir. 1996).....2, 3, 4

*Fishermen* v. *Closter Farms*, 300 F.3d 1294 (11th Cir. 2002).....7, 8

*Minnesota Ctr. for Envir. Advocacy* v. *Minn. Pollution Ctl. Agency*, 660 N.W.2d 427 (Minn. App. Ct. 2003)..... 9

*National Wildlife Federation* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) .....2, 3, 4

*National Wildlife Federation* v. *Gorsuch*, Admin., U.S. Environmental Protection Agency, 693 F.2d 156 (D.C. Cir. 1982).....2, 3, 4

*Northern Plains Resource Council* v. *Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003)..... 5

TABLE OF AUTHORITIES – Continued

Page

*Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers, et al.*, 531 U.S. 159 (2001) ..... 5

*United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501 (11th Cir. 1985) ..... 4

STATUTES AND REGULATIONS:

33 U.S.C. §1251(b)&(g) ..... 2

33 U.S.C. §1341(f)(2)(F) ..... 1

40 C.F.R. §122.47 ..... 9

*Section 62-620.705,* Fla. Admin. Code ..... 9

*Section 62-621.100,* Fla. Admin. Code ..... 9

OTHER AUTHORITIES:

*General Permit Program Guidance,* EPA Office of Water 4 (1988) ..... 9

U.S. EPA's NPES Permit Writers Manual <http://www.epa.gov/npdes/pubs/owm0243.pdf> ..... 8



This supplemental brief responds to the Brief for the United States as Amicus Curiae, which effectively underscores the need for this Court to grant certiorari.

The United States concedes that the Eleventh Circuit's ruling is "incorrect" (US Br. 13); that this Court will ultimately have to review the rule adopted by the court of appeals (US Br. 15 n.5); and that ensuring water quality in the Everglades is of paramount national importance. US Br. 1-7. It also acknowledges the agencies have exercised intensive oversight of the S-9 facility for 30 years, throughout which they have consistently addressed Everglades' water quality through system-wide planning and state permitting, *not* the NPDES program. *Ibid.*

At the same time, the United States stands silent on several matters raised in the Petition. It makes no mention of the second question presented, which asks why deference was not given to the agencies' longstanding and consistent practice of regulating S-9 under state, not NPDES permits. It does not challenge the agencies' interpretation, documented in FDEP's opinion letter (Pet. App. 43-48), that NPDES extends only to point sources from which pollutants originate, the core issue invoked by the Petition. It does not so much as mention the fifteen amici, joined in five briefs, and numerous letters from organizations and governmental representatives across the country (App., *infra.*, 1a-17a), which all attest to the critical national importance of the issues presented and to considerable concern with extending NPDES to traditional state and local water management.

In fact, the government largely avoids the key issues raised by the petition and amicus briefs:

1. Whether NPDES was ever intended by Congress to regulate state water control structures that add nothing to the waters (Pet. 20-21; Reply Br. 7-10);
2. Why the S-9 is not governed under §304(f)(2)(F) of the CWA, 33 U.S.C. §1314(f)(2)(F), providing for water pollution caused by levees, canals and flow diversion facilities to be addressed as non-point source under state, not NPDES guidelines (Pet. 6-7; Reply Br. 9-10);

3. Why a state's non-NPDES programs are not the preferable mechanism for regulating local water use decisions (Pet. 21-24; Reply Br. 9-10); and
4. Whether the imposition of NPDES in this case violates the careful balance struck in the CWA between federal and state rights and responsibilities. Pet. 5; 33 U.S.C. §1251(b) & (g).

The court of appeals below answered each of these questions differently than the courts of appeals in *Gorsuch* and *Consumers Power*, creating a square conflict ripe for this Court's resolution. Contrary to the government, we demonstrate below, these fundamental conflicts are legal, not factually dependent upon whether the waters involved have or ever had any hydrologic relationship to each other.

The United States seeks to discourage the Court's review with three misinformed arguments. First, the government mischaracterizes the court of appeals' error as "factual," by claiming any conflict in the case law can tidily be reconciled simply by considering the hydrologic relationships between transferred and receiving waters. Second, the government contends, without mentioning the amici and other national supporters (App., *infra.*, 1a-17a), that this case lacks nationwide import. Third, the government presents the startling, and incorrect, assumption that the "burden" of allowing the erroneous ruling to stand will be "modest." On these grounds the United States concludes that the proper scope of the CWA should be determined through fact-intensive inquiries and further litigation rather than with guidance from this Court as to the meaning of the statute. Each of these arguments is seriously misleading and should not discourage the Court from granting review.

1. According to the Solicitor General, the Eleventh Circuit's ruling turned on a factual inquiry into whether the S-9 point source and its accompanying levees and canals divide "two separate bodies of water" or a single water body. Furthermore, the government asserts the cases that we contend are in conflict – *Catskill*, *Gorsuch*, *Dubois*, *Consumers Power*, and the decision below – can all be



reconciled by reference to how each court answered this factual question. The government's argument ignores that the relevant facts in this case were *agreed*, not contested. It ignores that the Eleventh Circuit's "but for" test in no way turns on whether waters are unitary or separate. It ignores that the courts of appeals cases are deeply divided over whether the factual question identified by the government is of any legal relevance. It ignores that, in *Dubois*, the First Circuit specifically *rejected* the government's purported distinction. And it ignores that *Gorsuch* and *Consumers Powers* were *explicitly* decided on the basis that water was being transferred from one water body to another, yet no NPDES permit was required. In short, the government's "distinction" is no distinction at all, but merely confirms the rampant confusion as to the scope of the CWA's NPDES requirement.

To begin with, the Eleventh Circuit resolved no factual dispute as to the unitary nature of the waters in question or otherwise. The relevant facts are clear, were undisputed by the parties, and were acknowledged by both courts below. The parties *agreed* that the waters pumped by S-9 were "historically *** both part of the Everglades," so that "historically *** water flowed across both areas," and that the canal, levees, and pump station built by the Corps disrupted that flow and divided the C-11 basin from populated western Broward County. US Br. 6, 12; C.A. R. Vol. 2, Doc. 65 at 3-4. Water control projects invariably result in such changes and divisions, wherever in the country they are located, and whether designed for flood control, irrigation, drinking water supply, or otherwise. Changing the natural distribution of water is the very purpose of such projects, and in most such cases unitary water bodies are interrupted.

Moreover, the court of appeals did not deem the fact question relied on by the government to be legally relevant. The Eleventh Circuit's broad "but for" test for whether an "addition" of pollutants occurs "from" a point source depends not at all on the historic or natural relationship of the waters involved. In fact, the court expressly relied upon a prior decision requiring a permit to move pollutants within what was indisputably a *single* water body. See Pet.

App. 7a, citing *United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985). Thus, no "factually intensive inquiry" into the unitary or separate nature of the transferring and receiving waters occurred below; none was considered legally relevant.

The government's attempt to reconcile the case law by reference to how each court resolved this factual question is far off the mark. Far from neatly "distinguishing between [unitary and separate water bodies] for purposes of imposing NPDES permitting requirements" (US Br. 10), the courts of appeals differ fundamentally as to whether that distinction is of legal significance. Thus, in *Dubois*, the First Circuit rejected precisely the argument made by the government here, holding categorically that

> there is nothing in the [CWA] evincing a Congressional intent to distinguish between "unrelated" water bodies and related or hydrologically connected water bodies. The CWA simply addresses "any addition of any pollutant to navigable waters from any point source."

102 F.3d at 1298. And in *Gorsuch* and *Consumers Power*, which both held an NPDES permit *not* to be required, the D.C. and Sixth Circuits described the facts as involving moving water from one distinct water body (a reservoir and impoundment, respectively) to another (a river or lake). See 693 F.2d at 175; 862 F.2d at 589. The Second Circuit in *Catskill* did indeed rest its holding that a permit was required on the finding that water was moved between separate water bodies (mischaracterizing *Gorsuch* and *Consumers Power* as involving unitary waters). 273 F.3d at 492. But that ruling merely underlines the deep conflict and confusion among the courts of appeals.

As to a critical issue arising under a major federal statute and affecting public and private water managers and users throughout the Nation, the courts of appeals are in disarray. No factual question whether particular water bodies are unitary or separate underlies or resolves that deep conflict. Rather, the courts disagree on the meaning and application of core jurisdictional terms of the statute,



such as "discharge," "addition," and "from" a point source. This Court has recently considered the meaning of key CWA terms in *SWANCC* ("navigable waters") and *Borden Ranch* ("addition"), despite the factual component always involved in deciding how such terms apply in particular circumstances. It should do so again here to resolve a deep and important conflict among the circuits.

2. The Solicitor General pretends this case has "limited" importance beyond the operation of Everglades facilities. US Br. 14. But the government does not and cannot explain why the S-9 pumps and other Everglades facilities are any different for purposes of the CWA than millions of other water control devices around the country. Nothing about the Eleventh Circuit's sweeping "but for" test is unique to Everglades facilities or their regulatory framework. Accordingly, the court of appeals relied upon *none* of the Everglades-specific legislation discussed in the government's brief. US Br. 2-6. The government fails to explain how that legislation changes the CWA analysis in any way. The opinion below plainly implicates all water control structures that divert pollutants into waters which they otherwise would not go. Already, the Ninth Circuit has adopted the Eleventh Circuit's "but for" test to hold – in the context of an energy extraction operation that diverts groundwater into surface waterways – that "transporting water" "from one water body to another" without an NPDES permit can violate the CWA. *Northern Plains Res. Council* v. *Fidelity Expl. & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003).

In asserting that this case is of limited import the Solicitor General ignores the contrary conclusions of many public and private amici, including the National League of Cities, Association of Metropolitan Sewerage Agencies, National Association of Flood and Storm Water Management Agencies, Association of Metropolitan Water Agencies, Western Coalition of Arid States, National Water Resource Association, Western Urban Water Coalition, American Farm Bureau Federation, and Pacific Legal Foundation. He also fails to mention letters from numerous state and federal officials (including seven state attorneys general and a

bipartisan group of western Senators) gravely concerned about the far reaching consequences of the ruling below and explaining the need for this Court's urgent review. App., *infra.* 1a-17a.

Nationwide, these amici and elected officials explain, water transfers that are "essential steps" in providing water for irrigation, drinking water, flood control, ecosystem and species preservation, and other uses – transfers which have heretofore been uniformly regarded as outside the scope of the NPDES scheme – will now be dependent upon the vagaries of the costly, time-consuming, and uncertain NPDES permit process and its attendant litigation, because "[t]he biochemical constituents" of different waters "are inevitably different from one another." Br. Am. Cur. of NWRA, *et al.*, 4; Br. Am. Cur. of City of N.Y., *et al.*, 8. In consequence, water managers, though they add nothing to the water they transfer, will have to "significantly modify their operations," spend huge sums on "water treatment systems," "curtail their operations," or abandon innovative programs based on water banking and transfer that are designed to optimize water utilization. NWRA Br. at 5, 13. Downstream users and groups dissatisfied with water allocations to sport fishing, endangered species, agriculture, or myriad other interests will predictably use the NPDES permitting system to reopen and try to enhance those allocations. *Id.* at 6. See also, *e.g.*, N.Y. Br. at 2 (court of appeals' decision threatens "local governments' ability to move water from one source to another to meet local water supply needs" through "millions" of structures, none of which now operate with a federal permit). Nowhere does the Solicitor General respond to these serious concerns, expressed by public water management bodies that are far better placed to discern the havoc the Eleventh Circuit's faulty interpretation of the CWA will wreak.

Even accepting the government's mistaken view that this case is somehow limited to Everglades facilities, the critical importance of the questions presented to the Everglades cannot be doubted. The government concedes that petitioner and respondent Tribe are part of the Task Force charged with coordinating Everglades restoration policies.



US Br. 5. This and other suits anticipated against Petitioner's facilities takes restoration out of the cooperative, multiparty process that Congress established under the Water Resources Development Act and puts it instead in the hands of the federal courts and the burdensome, unpredictable NPDES process, in which every NPDES application and permit can result in further litigation over the propriety of permit issuance or conditions at the behest of any party that did not get what it wanted in the political process. "Congress has authorized more than one billion dollars in initial projects under CERP" (US Br. 5) – including hundreds of millions of dollars devoted to projects specifically involving the levees, canal, and basin served by the S-9 pump (US Br. 7) – as part of a restoration plan expected to cost in excess of $8 billion over the next several decades. Absent this Court's intervention, that project, on which hinges Congress' goal of "restoring, preserving, and protecting" the Everglades for future generations (US Br. 4), will be mired in costly and time-consuming NPDES permit proceedings and ensuing litigation and appeals, without any plausible basis in the CWA or its implementing regulations and contrary to the agencies' longstanding recognition that NPDES is not an appropriate feature of the regulatory environment for Everglades restoration.

The Solicitor General asserts that the decision below "may have circumscribed consequences even with respect to the Everglades" as a result of the Eleventh Circuit's subsequent decision in *Fishermen* v. *Closter Farms*, 300 F.3d 1294 (11th Cir. 2002). US Br. 15-16. *Closter Farms* in fact underlines the pressing importance of the questions presented. Under *Closter Farms* and the instant decision, an NPDES permit is required to transfer water containing any pollutants that are non-exempt or not already permitted under NPDES at their source. On that analysis, the need for an NPDES permit depends on an intense factual and legal inquiry into the source of *all* pollutants in the transferred water and whether *each* source either qualifies under the CWA as *exempt* or is *properly permitted* under NPDES. That is precisely the inquiry being undertaken in two additional suits filed against petitioner's facilities and that will have to

be undertaken in dozens more suits as to which notices of intent to sue have been given or that otherwise are expected to follow. Pollutants make their way to the C-11 canal and other water-collection features managed by the District from an enormous variety of sources, including runoff from many agricultural sources (not just exempt irrigation returns and stormwater runoff), municipal runoff, water released from devices protecting dozens of residential and commercial developments, naturally occurring pollutants, and water arriving in countless other ways. In consequence, the approach in *Closter Farms* will result in endless, complex, and uncertain litigation that is only necessitated by the concededly "incorrect" ruling below that an NPDES permit is required in the first place. Contrary to the government's belief that *Closter Farms* will circumscribe this problem, it is the substitution of endless bickering about "the facts in each case" for the "blanket rule" mandated by the CWA that is legally erroneous and practically destructive and that warrants immediate correction by this Court. US Br. 16.

3. The government wrongly speculates the burdens imposed by the ruling below "may be relatively modest." US Br. 17. The *erroneous* imposition of *any* federal regulatory scheme upon traditionally state and local activities, especially one like the CWA that provides for severe criminal and civil penalties, should alone be enough to warrant review. And there is nothing "modest" about NPDES permitting, which involves a labyrinthine application process that includes public hearings and comments, extensive water sampling and testing, effluent limitations, strict technological standards, and the treatment of pollutants. See US EPA's NPES Permit Writers Manual <http://www.epa.gov/npdes/pubs/owm0243.pdf>; Ch. 62-620, Fla. Admin. Code. This burden is compounded by the opportunities for litigation about the propriety of a permit and compliance with its terms once it is issued. Obtaining and defending permits nowhere required by the CWA will divert resources from the Comprehensive Everglades Restoration Plan that the federal and state participants deem the preferred route for environmental restoration, and interfere with countless other water management programs across the country. That



the injunction against the operation of S-9 issued by the district court was lifted ameliorates none of the burdens of NPDES compliance, which are all the more severe because petitioner (like most public water managers) now faces the threat of criminal and civil penalties for its handling of pollutants introduced by others it does not control. See, *e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003) (imposing $5.75 million civil fine on New York, out of a maximum possible fine exceeding $63 million, for having moved water without an NPDES permit).

Petitioner also takes no solace in the government's suggestion that general permits and compliance schedules may diminish these burdens: they do not. US Br. 17. General permits were developed to streamline the process of permitting *large numbers* of similar point sources, something the government claims will not result from this case (despite the slew of suits and notices to sue involving district facilities that followed the ruling here). See *General Permit Program Guidance, EPA Office of Water* 4 (1988). General permits still impose effluent limitations, technological standards, costly treatment, monitoring, and sampling. *Ibid.*; Sec. 62-621.100, Fla. Admin. Code. Establishing a general permit through rulemaking often takes years, to determine that the point sources are substantially similar in operation, discharge the same types of pollutants and require similar effluent limitations and monitoring. Sec. 62-620.705, Fla. Admin. Code. And general permits have become particular targets recently of administrative and judicial challenge. See, *e.g.*, *Minnesota Ctr. for Envir. Adv.* v. *Minn. Pollution Ctl. Ag.*, 660 N.W.2d 427 (Minn. App. Ct. 2003). Compliance schedules merely defer onerous obligations upon a showing that time is necessary to comply, while imposing additional annual reporting requirements. 40 C.F.R. §122.47.

The burden of NPDES permitting cannot be mollified by "replicating the standards, schedules and strategies of the existing state permit." US Br. 17. State permitting, adopted under a different regulatory scheme, provides local water managers necessary flexibility to balance competing interests. NPDES imposes a more stringent duty to meet effluent

limitations tailored to individual point sources through best available technological controls, leaving water managers unable to consider other critical environmental factors. As the Petition explains, NPDES is a poor substitute for the comprehensive watershed planning by agencies with specialized expertise the existing state permitting scheme provides. Pet. 21.

The government's myopic view that this case is somehow limited to Everglades facilities leads it to ignore the broader impact of expanding NPDES. That includes tremendous burdens on already resource-strapped regulatory agencies that will have to permit hundreds of thousands of newly regulated point sources, and on state and local water management agencies that must divert scarce resources to a permitting process that Congress never intended to apply to mere movement of water.

4. Inexplicably, the government ignores the second question presented, whether deference should have been given the federal and state implementing agencies. The government concedes the agencies' knowing acquiescence in the operation of S-9 without an NPDES permit and participation in developing the Comprehensive Everglades Restoration Plan as the preferred method of addressing water quality problems for the Everglades. US Br. i, 5-6. The government fails to acknowledge Florida DEP's express concurrence that NPDES is not required. Pet. App. 43a-48a. These longstanding agency positions are confirmed by the government's view that the decision here was incorrect. In these circumstances, deference is required to the implementing agencies' consistent interpretation of the CWA that an NPDES is not necessary. The extent to which deference is required in these circumstances warrants this Court's review. See Pet. 27-29; *AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. at 385 n.10.

## CONCLUSION

For the foregoing reasons and those set forth in the Petition, this Court should grant certiorari, not leave the questions presented to a stream of wasteful litigation and administrative challenges.

Respectfully submitted,

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# APPENDIX

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May 14, 2003

**By Fax and Regular Mail**

The Honorable Theodore Olson
Solicitor General
950 Pennsylvania Ave. NW
Washington, D.C. 20530-0001

Re: Petition for Writ of Certiorari in Miccosukee Tribe of Indians v. South Florida Water Management District, 280 F.3d 1364 (11th Cir. 2002)

Dear Solicitor General Olson:

I write to follow up our telephone conversation of yesterday concerning the petition for a writ of certiorari in *Miccosukee Tribe of Indians v. South Florida Water Management District*. On behalf of the City of New York, I urge you to support the petition and to encourage the Supreme Court to reverse the decision of the Eleventh Circuit, which poses a serious threat to local governments and water management agencies throughout the nation.

As we discussed, the Eleventh Circuit in the Florida case followed the Second Circuit's decision in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001). In *Catskill Mountains*, several sporting groups initiated a Clean Water Act citizen suit against New York City, claiming that the City's transfer of water from one of its drinking water reservoirs,

which naturally contains suspended solids because of the geology of its watershed, to the main tributary of another City reservoir, constituted the discharge of pollutants requiring a permit under the Clean Water Act. Although the District Court granted the City's motion to dismiss, the Second Circuit reversed, holding that the transfer is subject to the Clean Water Act. We believe the decisions of the Second and Eleventh Circuits are inconsistent with decisions of the decisions [sic] of the two other federal appellate courts: *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988).

Because of the City's and other local governments' general concerns as water managers, and the City's specific concerns in light of the *Catskill Mountains* case, my office submitted an amicus brief in support of the South Florida Water Management District's petition for certiorari on behalf of New York City, several national organizations representing municipal and regional water management agencies, and the National League of Cities. (A copy of that amicus brief is enclosed with the mailed copy of this letter.)

Both *Catskill Mountains* and *Miccosukee* involve the question of what constitutes an "addition" of pollutants under the Clean Water Act for purposes of determining whether a discharge requires a Clean Water Act permit. In both cases, appellate courts essentially held that the mere diversion of untreated water that, *for reasons not caused by the municipality undertaking the diversion*, constitutes an "addition" of pollutants. This interpretation of the Clean Water Act has very significant potential impacts on any number of activities that have not previously been subject to Clean Water Act permits, such as transfers of



water from one reservoir to another (New York City's immediate concern), water management for flood control (the issue in the Florida case), releases from dams, and operation of canals.

While certain transfers of natural waters can and should be regulated pursuant to other federal and state laws, the permitting scheme under the Clean Water Act (known as the National Pollutant Discharge Elimination System, or "NPDES" program) is not an appropriate means for addressing such transfers. First, the NPDES program was designed to address discharges from wastewater treatment plants and industrial facilities and cannot effectively handle several million additional dams, canals, and other existing water transfer structures. The current volume of some 116,000 NPDES permits issued nationwide already strains the administrative and technical capacities of EPA and the delegated states. For instance, according to EPA's website, 18% of outstanding NPDES permits have expired, which indicates that the administrative agencies have not been able to meet the statutory requirement that NPDES permits be issued for no more than five years. *See* 33 U.S.C. § 1342(b)(1)(B).

Second, the NPDES program does not have the flexibility to ensure that facilities necessary for public health and safety can remain in operation. NPDES permits must include requirements to "achieve water quality standards." 40 CFR § 122.44(d)(1). To take New York City as an example, this requirement poses a significant challenge, since there may be no practicable way to ensure that the discharge at issue in *Catskill Mountains* can meet the New York State water quality standard for turbidity: no increase that will cause a substantial visible contrast to natural conditions. Conceivably, this could lead to a

prohibition against New York City's continued use of the approximately 16% of its water supply provided by the facility at issue in *Catskill Mountains*. Loss of this water source would jeopardize the City's ability to ensure an adequate supply of water to meet its daily demand.

For these reasons, the decisions of the Second and Eleventh Circuits are of great concern to a variety of private and governmental parties and therefore should be reviewed by the Supreme Court. We very much appreciate your attention to this matter. I hope you or your staff will feel free to call me if I can be of any assistance to you.

Sincerely,

/s/ Michael A. Cardozo
Michael A. Cardozo

MAC/ay

cc: Edwin Kneedler, Deputy Assistant Solicitor General
Mark Hoffer, General Counsel, NYC Department of Environmental Protection

---



[LOGO]

[State of Idaho]

DIRK KEMPTHORNE
GOVERNOR

May 5, 2003

VIA FACSIMILE AND U.S. MAIL

The Honorable Theodore B. Olson
Solicitor General
Department of Justice
Washington, DC 20530-0001

**Re: *South Florida Water Management District v. Miccosukee Tribe of Indians*, United States Supreme Court No. 02-626 Petition for Writ of Certiorari**

Dear General Olson:

## I. INTRODUCTION

By order dated January 12, 2003, the United States Supreme Court asked for your views on a petition for certiorari pending in the above-entitled case, *South Florida Water Management District v. Miccosukee Tribe*, 280 F.3d 1364 (11th Cir. 2002), (*petition for cert. filed* Oct. 21, 2002) (U.S. No. 02-626) (*Miccosukee Tribe*). I am writing to strongly urge the Justice Department to request that the United States Supreme Court grant certiorari in this important case.

I am mindful of the sensitive setting of this particular application of the Clean Water Act. The Florida Everglades is a natural resource treasure to the State of Florida and our Country. Of course, the unwavering

efforts by the Bush Administration to protect the Everglades should continue with all due speed.

However, the holding of the Eleventh Circuit in *Miccosukee Tribe*, specifically, that the federal Clean Water Act (CWA) is expansive enough to require a National Pollutant Discharge Elimination System (NPDES) permit upon the mere movement of water between state transport systems, is an important issue of federal law which should be decided by the Supreme Court. The impact of this decision is already being felt in Idaho and the West.

Additionally, *Miccosukee Tribe* raises important federalism issues implicating the ability of states to maintain sovereignty over its water and warrants attention and clarification by the Court.

## II. DISCUSSION

### A. The Importance of the Holding in *Miccosukee Tribe* and Its Broader Impact in the Ninth Circuit and the West: *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*

The principles of law at stake in *Miccosukee Tribe* will potentially have far reaching impacts for water management throughout the country, particularly in the West. Indeed, the decision by the Eleventh Circuit has already had an expansive interpretation in the Ninth Circuit and, unless reviewed, is binding on the Western states.

On April, 10, 2003, a three-judge panel of the United States Court of Appeals for the Ninth Circuit decided *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, ___ F.3d ___, 2003 WL 1847401 (9th



Cir. 2003) (slip opinion attached), a case described by the court as analogous to *Miccosukee Tribe*.

In *Northern Plains*, an energy exploration company developing natural gas was accused of violating the Clean Water Act when it brought untreated coal bed methane ("CBM") produced water to the surface and into the Tongue River. The plaintiffs charged that an NPDES permit was needed even though the company did not add any chemicals to the water before discharge and the State of Montana exempted such discharge from the permitting requirements.

The critical issue in *Northern Plains* was whether the discharge of CBM water constituted a "pollutant" within the meaning of the Clean Water Act. The Ninth Circuit held that "the unaltered groundwater produced in association with methane gas extraction, and discharged into a river, is a pollutant within the meaning of the CWA." *Northern Plains*, slip op. at 4814. In reasoning that parallels *Miccosukee Tribe*, the Ninth Circuit noted that "but for" the action of the discharger, water would not reach waters of the United States.

The Ninth Circuit in *Northern Plains* cited *Miccosukee Tribe* as support for three key findings under the Clean Water Act.

First, the court held that the requirement in the CWA for pollution be "man-induced" refers to the effect of the discharge *on the receiving water*, but does not require that the discharged water be altered by man. *Id.* at 4822. Second, the court stated that merely "transporting water from one water body to another can violate the CWA." *Id.* at 4824. Finally, the Ninth Circuit held that the transport

of water can degrade the water quality of receiving waters. *Id.* at 4285.

Citing both the language of the CWA and the conclusions of other circuits in analogous cases (*Miccosukee Tribe, Catskill Mountain Chapter of Trout Unlimited, Inc. v City of New York*, 273 F. 3d. 481 (2nd Cir. 2001), *DuBois v. U.S. Dept. of Agric.*, 102 F 3d. 1273 (1st Cir. 1996), the Ninth Circuit held that CBM water discharged into the Tongue River is a "pollutant" under the CWA, *id.* at 4824, and that the discharger is subject to the NPDES permitting requirements of the CWA.

*Northern Plains* does not address a transbasin water transfer *per se*, but its essential holding – the transfer of unaltered water from one water body to another is subject to NPDES permitting where it alters the water quality of the receiving body – is analogous to *Miccosukee Tribe*. This sets a potentially dangerous precedent in the Ninth Circuit and the West. One of the legal cornerstones of the dubious decision in *Northern Plains* is the instant case the Supreme Court has asked for the views of the United States.

### B. The Holding of *Miccosukee Tribe* Raises Important Federalism Concerns

As noted in the *amicus curiae* brief filed in the Supreme Court by the National Water Resources Association, the decision in *Miccosukee Tribe* degrades the right of states to control their water and delegated Clean Water Act programs. I strongly agree that "[t]he management of land and water is predominantly a state prerogative." Brief Amicus Curiae of the National Water Resources Coalition, *et al.*, at 12.



The *Northern Plains* decision, which, as noted above, relied heavily on *Miccosukee Tribe*, is a case study of how the balance of water management in favor of the states may be set askew. There, the State of Montana Department of Environmental (MDEQ) quality had determined that an NPDES permit was *not* necessary for the CBM exploration engaged in by the defendants, and that view was upheld by the District Court. As noted, the Ninth Circuit disagreed and reversed.

The most troubling passage of *Northern Plains* is the Ninth Circuit's observation that "it cannot possibly be urged that . . . state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution's Supremacy Clause." *Northern Plains*, slip op. at 4827. The Ninth Circuit reached this conclusion after the lower court held that the MDEQ-administered Clean Water Act program had been appropriately approved by the United States Environmental Protection Agency and not revoked.

Accordingly, under *Miccosukee Tribe*, the states and the water user community could still be exposed under the Clean Water Act even though they might have received assurances that an NPDES permit is not necessary for the type of water transactions they have safely practiced in the past. *Northern Plains*, strongly supported by *Miccosukee Tribe*, clearly places state-delegated CWA programs on a slippery slope favoring the top-down regulatory decision making that "cooperative federalism" models were designed to avoid.

## III. CONCLUSION

The pending petition for writ of certiorari in *South Florida Water Management District v. Miccosukee Tribe* raises important issues of federal law which should be decided by the United States Supreme Court. Additionally, the ability of states to administer water management programs with integrity and under cooperative federalism paradigms is at stake if the decision is allowed to stand.

For these reasons, the United States should request to the Supreme Court to grant certiorari in *Miccosukee Tribe*.

Your personal attention to this matter is greatly appreciated.

Sincerely,

/s/ Dirk Kempthorne
DIRK KEMPTHORNE
Governor

DK: lmb

cc: Ms. Ann Klee
Counselor to the Secretary
Department of Interior

Mr. Norman Semanko
Executive Director
Idaho Water Users Association

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**United States Senate**
WASHINGTON, DC 20510

February 21, 2003

Hon. Theodore B. Olson, Solicitor General
Office of the Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

RE: *Miccosukee Tribe of Indians v. So. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002)

Dear Solicitor General Olson:

We urge you to support the petition for certiorari in Miccosukee Tribe of Indians v. So. Florida Water Mgmt. Dist. 280 F.3d 1364 (11th Cir. 2002). This Eleventh Circuit decision results in a significant split in the federal circuits. States require clear and settled legal parameters in managing their land and water resources.

In the West, the transference of water between basins for municipal, industrial and agricultural use is a routine practice managed by the states. Under the Miccosukee opinion, any transfer of water containing a measurable quantity of constituents from one basin or sub-basin to another through a ditch, tunnel, canal, pipeline or other conveyance structure in the legitimate exercise of water rights and in order to fulfill municipal, agricultural and industrial water supply demands would require an NPDES point source discharge permit. This permit requirement would apply even though the transfer of water is in its natural condition, and the entity moving the water adds no pollutants. Such a constraint upon the ability to move water to the place of need, for example from high mountain run-off areas to dry low-lying urban corridors,

could significantly impair Western economies and exacerbate our drought situation, while interfering with land use planning decisions.

As you are aware, the Supreme Court has invited you to file a brief expressing the views of the United States in this case. The Circuits are now equally divided. While the First, Second and now Eleventh Circuits have held that such basin transfers are point sources that require permits, the Fourth, Sixth and D.C. Circuits have interpreted the Act as requiring the introduction of a pollutant from a point source before such a permit is mandated.

In finding that such water conveyance activities trigger a need for a permit, Miccosukee implicates every trans-basin and intra-basin diversion, thereby threatening our ability to use our limited water resources to meet both traditional consumptive uses, as well as environmental demands. For example, much of the water upon which certain threatened or endangered species now depend is trans-basin return flows, while what were historically dry arroyos or ephemeral stream systems are now perennial in nature due to the use of imported waters.

The federal government has long recognized the right to use water is to be determined under the laws of the states. Federal regulation of the simple movement of water, as would be the case under Miccosukee, is in direct convention of this well-established balance between state and federal interests, as reflected in Section 101(g) of the Clean Water Act.

The Supreme Court is clearly interested in this case, not only for its CWA post-SWANNC issues, but also its federalism implications. We believe the United States has an obligation to protect the interests of all its citizens from



the impacts of an overly broad court holding, the practical implications of which may not have been fully considered. We therefore urge you to support the petition for certiorari.

Sincerely,

/s/ Jon Kyl
Jon Kyl
United States Senator

/s/ Dianne Feinstein
Dianne Feinstein
United States Senator

/s/ Gordon Smith
Gordon Smith
United States Senator

/s/ Ron Wyden
Ron Wyden
United States Senator

/s/ Pete Domenici
Pete Domenici
United States Senator

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Ben Nelson
United States Senator

/s/ Wayne Allard
Wayne Allard
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/s/ Max Baucus
Max Baucus
United States Senator

/s/ Larry Craig
Larry Craig
United States Senator

/s/ Orrin Hatch
Orrin Hatch
United States Senator

/s/ Mike Crapo
Mike Crapo
United States Senator

/s/ Craig Thomas
Craig Thomas
United States Senator

/s/ Ben Nighthorse Campbell
Ben Nighthorse Campbell
United States Senator

/s/ Conrad Burns
Conrad Burns
United States Senator

/s/ Kay Bailey Hutchison
Kay Bailey Hutchison
United States Senator

cc:

The Honorable Gale Norton
Secretary of the Interior

The Hon. LTG Robert B. Flowers
Commander
HQ US Army Corps of Engineers

The Honorable
Christie Todd Whitman
Administrator, Environmental
Protection Agency

The Honorable
Thomas L. Samsonetti
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**BY TELEFAX – 202-273-3501**

January 24, 2003

The Honorable Gale A. Norton
Secretary of the Interior
U.S. Department of the Interior
1849 C. Street N.W.
Washington, D.C. 20240

**CORRECTED COPY – W/SIGNATURES**

Dear Secretary Norton:

The undersigned Attorneys General urge your consideration of this matter. As you know, the United States Supreme Court is considering a Petition for Writ of Certiorari in the case of *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.* No. 02-626. We understand that the Supreme Court has requested that the United States Solicitor General provide the Court with the views of the United States government on the issues raised in the case. We are writing to you now to urge that your department support granting the Petition for Writ of Certiorari and reversing the decision of the United States Court of Appeals for the Eleventh Circuit.

The *Miccosukee* case raises an issue of vital importance to the economic and social well being of the West. The issue presented in the case is whether the mere collection of water in one river basin and delivering that

water to another river basin for use, without the addition of any pollutants by the water purveyor, requires a National Pollutant Discharge Elimination Permit under the federal Clean Water Act.

Water in the arid west is all to often located far from the areas where it is most needed. Accordingly, the United States Bureau of Reclamation, and numerous western cities, irrigation districts, water conservancy districts and other water providers operate extensive systems of tunnels, canals, pipelines and reservoirs that move water from one river basin to another, so that the water can be used for irrigation, municipal and other purposes. For example, in New Mexico the Cities of Santa Fe and Albuquerque, and numerous farmers, depend upon transbasin water deliveries to meet municipal water supply needs and to irrigate vital crops. Similar transbasin projects exist throughout the West.

The imposition of a new federal permitting requirement on these long standing water transportation practices could require the owners/operators of the affected facilities to either significantly modify their operations, build and operate expensive water treatment systems, or curtail their operations altogether. Thus, this new permitting requirement could severely impact the continued economic vitality of the west, and could even reduce or eliminate water supplies in some cases.

Both the Congress and the United States Supreme Court have historically deferred to the states in matters of water use, and have avoided impinging on state and local authority in this area. The federal Clean Water Act does not contain any plain statement indicating a contrary intent of Congress, and, in fact, expresses Congress' continued desire



to honor state and local decision-making in the management of water resources. 33 U.S.C. § 1251(g). In light of the great importance of this issue to the arid west, we urge that your department continue to honor this historic deference to state law in matters of water use and support granting the Petition for Writ of Certiorari and reversing the court of appeals decision.

If you have any questions or concerns about our position or the issues, please do not hesitate to contact CWAG Executive Director Tom Gede at 916-323-1939, e-mail at tom.gede@doj.ca.gov. or New Mexico Attorney General Patricia or her Assistant Attorney General Steve Farris at (cell) 505-239-4672, (office) 505-827-6938.

/s/ Patricia Madrid
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Colorado Attorney General

MOTION FILED
NOV 25 2002

(3)

No. 02-626

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

-v.-

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

# MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE CITY OF NEW YORK, THE NATIONAL LEAGUE OF CITIES, THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, AND THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the transfer of untreated water from one natural source to another constitutes an "addition" of pollutants under the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*

## TABLE OF CONTENTS


**Page**

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ..... 1

INTEREST OF *AMICI CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 5

FACTUAL BACKGROUND ..... 6

ARGUMENT ..... 9

I. RECENT DECISIONS OF THE FIRST, SECOND AND ELEVENTH CIRCUITS CANNOT BE RECONCILED WITH THE INTERPRETATION OF "ADDITION" ADOPTED BY THE DISTRICT OF COLUMBIA AND SIXTH CIRCUITS ..... 11

II. *GORSUCH* AND *CONSUMERS POWER* ARE NOT DISTINGUISHABLE FROM *MICCOSUKEE* AND *CATSKILL MOUNTAINS* ..... 13

CONCLUSION ..... 16




## TABLE OF AUTHORITIES


**Cases** **Page**

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001) ..... *passim*

*Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ..... 13, 14

*Christensen v. Harris County*, 529 U.S. 576 (2000) ..... 13-15

*Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993), *cert. denied sub nom. Members of Cal. Reg'l Water Quality Control Board v. Comm. to Save Mokelumne River* 513 U.S. 873 (1994) ..... 12

*Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) ..... 9, 12-13

*Miccosukee Tribe of Indians et. al v. South Florida Water Management Dist.*, 280 F.3d 1364 (11th Cir. 2002) ..... *passim*

*National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988) ..... 9, 11, 13-15

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... 9, 10, 11, 13-15

**Statutes and Regulations**

40 C.F.R. § 122.44(d)(1) ..... 7

Clean Water Act, 6 Stat. 880 (Oct. 18, 1972) ..... 5

Clean Water Act, 33 U.S.C. §§ 1251 *et seq*..... *passim*
Clean Water Act, 33 U.S.C. § 1311(a) .....9, 10
Clean Water Act, 33 U.S.C. § 1342..... *passim*
Clean Water Act, 33 U.S.C. § 1342(b)(1)(B) .....10
Clean Water Act, 33 U.S.C. § 1362(12) .....9, 12
6 N.Y.C.R.R. § 703.2..... .....7

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of this Court, the City of New York, the National League of Cities, the Association of Metropolitan Water Agencies, the National Association of Flood and Stormwater Management Agencies, and the Association of Metropolitan Sewerage Agencies, request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Consent for *amici* participation was requested of all parties on November 6, 2002, but was denied by respondents Miccosukee Tribe of Indians and Friends of the Everglades.

## INTERESTS OF *AMICI CURIAE*

*Amici curiae* submit this brief in support of the South Florida Water Management District's petition for a writ of certiorari to the Supreme Court, seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1]

Transfers and diversions of untreated water are essential to the design and operation of public water supply systems as well as to municipal and regional flood control and water management efforts. All surface water supply systems involving more than a single reservoir rely

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

fundamentally on local governments' ability to move water from one source to another to meet local water supply needs. Similarly, countless water management systems throughout the country transfer water to areas that need water or away from areas in danger of flooding. Petitioner asks the Court to reverse a decision by the Eleventh Circuit Court of Appeals that threatens the operation of all such systems.

Until recently, no court or regulatory agency has suggested that transfers of natural water, in the context of routine municipal water management activities, require Clean Water Act permits (National Pollutant Discharge Elimination System, or NPDES permits). Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments for ordinary management of water, for public water supply, flood control, commerce, and other governmental and public purposes, currently operates pursuant to such a federal permit.

Most such water management structures predate the enactment of the Clean Water Act in 1972 and have been in continuous operation since that time. The holding of the Eleventh Circuit in the instant case, and the recent similar holding of the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001), which was essentially adopted by the Eleventh Circuit in *Miccosukee*, could disrupt these basic governmental functions.

*Amici* are local governments, water suppliers, and consortia of cities or local water management agencies. The local water management authority of each *amicus* has been superseded by the Eleventh Circuit's decision—



contrary to Congress' intent in enacting the Clean Water Act.

The City of New York is a political subdivision of the State of New York that owns and operates a water supply system that provides water of excellent quality to some nine million residents of the City and State of New York. The City's water supply system depends on transfers of natural, untreated water from each reservoir downstream to the next. As discussed below, the City's ability to supply sufficient water to fulfill its demand is threatened by the Second Circuit's decision in *Catskill Mountains*.

The National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. NLC serves as a national resource and advocate on behalf of over 1,800 member cities and for 49 state municipal leagues whose membership totals more than 18,000 cities and towns across the country. The specific interest of the National League of Cities—which advocates for municipal interests at the federal level—in this case lies in the fact that municipal governments have historic authority and responsibilities to protect public safety and the health of their citizens in the management of their resources.

The Association of Metropolitan Water Agencies (AMWA) represents the nation's largest publicly-owned municipal drinking water suppliers. AMWA's 168 members include agencies and divisions of city governments, and special purpose commissions, districts, agencies and authorities created under state law to supply drinking water to the public. AMWA's members provide drinking water to over 110 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and

other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another.

The National Association of Flood and Stormwater Management Agencies (NAFSMA), established in 1979, represents more than 100 local and state flood control and stormwater management agencies. NAFSMA members are public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. NAFSMA member activities are also focused on the improvement of the health and quality of our nation's waters. The mission of the association is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance the achievement of the public service functions of its members. NAFSMA is concerned that routine flood management activities would require NPDES permits under the Circuit Court's decision.

The Association of Metropolitan Sewerage Agencies (AMSA) has represented the nation's publicly-owned wastewater treatment agencies (POTWs) since 1970. AMSA's over 270 member agencies provide the majority of the U.S. population with sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. AMSA members are concerned that the Eleventh Circuit's decision will subject thousands of new local governmental water management decisions to NPDES permits.



## SUMMARY OF ARGUMENT

During the 30 years since its enactment, the Clean Water Act has never, until recently, been interpreted to regulate transfers and diversions of natural, untreated water. Many municipal and regional water management systems existed in the United States for decades before the enactment of the Clean Water Act in 1972. Pub. L. 92-500, 86 Stat. 880 (Oct. 18, 1972). The United States Environmental Protection Agency (EPA) has never required that such transfers and diversions operate pursuant to Clean Water Act NPDES permits. Similarly, none of the more than 40 states with delegated authority to administer the Clean Water Act permit program by EPA has historically required Clean Water Act permits for these water transfers and diversions.

Indeed, with the Clean Water Act permit program having been in place for 30 years, EPA and the delegated states combined have issued some 64,000 Clean Water Act permits for existing discharges. If, as the Eleventh Circuit's decision in *Miccosukee* suggests, the over two million dams and diversion structures across the nation require NPDES permits, a fundamental restructuring of the administration of such permits—far beyond what Congress envisioned in creating the NPDES program—will be required.

The United States Courts of Appeals in several circuits have considered this issue and have reached different conclusions. Both because of the importance of this issue to hundreds of municipalities and regional authorities engaged in water supply and flood control activities across the country, and because of the split among the circuits, this Court should issue a writ of certiorari in this case.

## FACTUAL BACKGROUND

The facts of *Miccosukee* and the Second Circuit's *Catskill Mountains* case are typical of the diversions and transfers frequently undertaken by municipal and regional water management agencies for water supply, flood control, and other local water management purposes. We thus describe the facts in *Catskill Mountains* in some detail to illustrate the types of facilities currently operating, without federal Clean Water Act permits, throughout the United States.

Such facilities serve important public functions. Equally importantly, as illustrated by the facts described below, obtaining a permit is not a simple ministerial process. Accordingly, the recent decisions of the Second and Eleventh Circuits threaten to disrupt basic water management operations across the nation.

New York City owns and operates a water supply system in upstate New York. The facility at issue in the *Catskill Mountains* case, the Shandaken Tunnel, transfers water from one of the two reservoirs that comprise New York City's Catskill water supply system, the Schoharie, to the other, the Ashokan reservoir. Specifically, the Tunnel moves water from the Schoharie reservoir to the Esopus Creek, the main tributary to the Ashokan. New York City's average demand for water is about 1.2 billion gallons per day, of which the Catskill system generally provides about 40%. Approximately 40% of the Catskill supply, or 16% of New York City's drinking water, originates in the Schoharie Reservoir. The Ashokan reservoir went into service in 1915. The Shandaken Tunnel and the Schoharie reservoir were both on line by 1926.

New York City does not treat water collected in the Schoharie reservoir before diverting it through the



Shandaken Tunnel. However, the Catskill Mountains are characterized by extensive deposits of silts and clays, which are often exposed by erosion, particularly during storms. As a result, water in the Schoharie reservoir and released from the Tunnel regularly contains elevated levels of suspended solids, and thus turbidity. Based on extensive research and analysis, New York City believes that no matter what reasonable structural and programmatic measures are implemented, the discharges from the Shandaken Tunnel will continue, on a regular basis, to be visibly more turbid than the receiving water, the Esopus Creek.

Clean Water Act permits must include effluent limits to "achieve water quality standards … including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). The state water quality standard for discharges of turbid waters in New York is: "no increase that will cause a substantial visible contrast to natural conditions." 6 New York Codes, Rules and Regulations (N.Y.C.R.R.) § 703.2. Because there may not be a practicable way to ensure that discharges from the Shandaken Tunnel are never more turbid than the receiving waters, it is possible that New York City will be unable to obtain a Clean Water Act permit for its transfer of water through the Tunnel. Under the Second Circuit's decision in *Catskill Mountains*, New York City is in violation of the Clean Water Act every time it transfers water through the Tunnel. This could lead to a prohibition against New York City's continued use of the approximately 16% of its water supply, jeopardizing New York City's ability to ensure an adequate supply of water to meet its daily demand.

Similarly, the myriad water management facilities involved in analogous diversions and transfers of natural, untreated water for water supply and flood control purposes

(including other portions of New York City's water supply system) face similar risks, of continually violating the Clean Water Act or ceasing fundamental water management activities, if the novel interpretation of the Clean Water Act recently adopted by the Second and Eleventh Circuits is left to stand. The facts of *Miccosukee* illustrate the potential impacts of this interpretation for flood control facilities: the injunction initially issued by the district court would "cause substantial flooding in western Broward County which, in turn, would cause damage to and displacement of a significant number of people." 280 F.3d 1364, 1369-70.

Moreover, diversions or transfers of natural, untreated water are often vital to sustaining a healthy aquatic environment in the receiving water body. For instance, water from the Shandaken Tunnel, which is generally cold, is essential to maintaining the trout fishery in the Esopus Creek, especially during the summer when temperatures in the Creek rise and natural flow (that is, flow without the addition of water from the Tunnel) is diminished. If the reasoning of the Second and Eleventh Circuits is upheld, operators of water supply or flood control infrastructure may be forced to alter or even eliminate diversions or transfers of water, in the interest of avoiding liability under the Clean Water Act, but to the detriment of ecosystems that depend on such flows. Such a result runs counter to the goals of the Clean Water Act.

The biochemical constituents of distinct, untreated bodies of water are inevitably different from one to another. Thus, diversions or transfers of untreated water are likely to involve transfers of water containing certain constituents in higher concentrations than they may occur in the receiving waters, such as turbidity in the *Catskill Mountains* case or the nutrients at issue in *Miccosukee*. Such incidental



movements of the natural constituents of untreated water should not be considered "additions" of pollutants under the Clean Water Act.

## ARGUMENT

The Clean Water Act provides that unless a discharge permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. A discharge permit is required when (1) a pollutant is (2) added (3) to navigable waters (4) from (5) a point source. 33 U.S.C. §§ 1311(a), 1342, 1362(12); *see also National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988). In *Miccosukee, Catskill Mountains*, and *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), Courts of Appeals have abandoned an established line of appellate cases and have determined that a transfer of untreated water can be an "addition" under the Clean Water Act.

As discussed above, this new interpretation of the Clean Water Act will affect a vast array of municipal water management activities nationwide. The recent appellate decisions threaten the continued operations of certain facilities that are vital for water supply, local government water management, and flood control. These decisions run counter to Congress' intent that states and local governments retain autonomy over local water management decisions.

If these decisions are not reversed, the scope of the Clean Water Act's NPDES permit program will far exceed the capacities of EPA and states with delegated authority to administer the program. According to EPA, "more than 64,000 facilities nationwide" currently have NPDES permits. *See* http://www.epa.gov/compliance/planning/data/water/pcssys.html (last updated October 26, 2002). Even

with the current volume, EPA and the delegated states have not been able to administer the NPDES program in accordance with the statutory requirement that NPDES permits be issued for no more than five years. *See* 33 U.S.C. § 1342(b)(1)(B). EPA has established a goal of reducing the backlog of all permits to 10% by the end of 2004. *See* http://cfpub.epa.gov/npdes/permitissuance/goals.cfm (last updated October 30, 2002). As of October 31, 2000 (the date of the information on EPA's website), at least 21% of NPDES permits issued had expired, and only 70% were known to be current. *See* http://cfpub.epa.gov/npdes/images/permit_backlog. gif.

In contrast, there are over two million dams, and countless other diversion structures across the nation that are currently operating in accordance with various applicable state and local regulation but without NPDES permits. *See, e.g., Gorsuch,* 693 F.2d 156, 182. In light of the manifest administrative problems with the NPDES program, even with its current scope, a more than 30-fold increase in the number of entities requiring Clean Water Act permits would overwhelm permitting agencies across the nation. The scope of the NPDES program under the Eleventh Circuit's decision in *Miccosukee* is more than an order of magnitude greater than Congress or regulators have envisioned during the 30 years since the Clean Water Act took effect.

In holding that the release of natural, untreated water is governed by the Clean Water Act's permitting requirements as set forth in 33 U.S.C. §§ 1311(a) and 1342, the Second and Eleventh Circuits departed from the interpretation of the term "addition" adopted by District of Columbia and Sixth Circuits. No prior case law supports the proposition that the mere transfer of untreated water, from one water body to another, is, in and of itself, an



"addition" of pollutants requiring a Clean Water Act permit. Prior cases interpreting the Clean Water Act found that more than a mere diversion of flow from one body to another is necessary to constitute an "addition" under the Act—pollutants must be added at the point source itself.

## I

## RECENT DECISIONS OF THE FIRST, SECOND AND ELEVENTH CIRCUITS CANNOT BE RECONCILED WITH THE INTERPRETATION OF "ADDITION" ADOPTED BY THE DISTRICT OF COLUMBIA AND SIXTH CIRCUITS.

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 164 (D.C. Cir. 1982), the court addressed whether dam-induced water quality changes are "addition[s] that trigger the NPDES permit requirement." The court agreed with EPA that they were not, because a pollutant was not physically introduced "into the water from the outside world." *Id.* at 175. Once a pollutant already exists in navigable water, there can be no subsequent addition of that pollutant, even if that water is transferred from one body of navigable water to another. Similarly, in *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988), the court held that the release of fish and fish parts from a hydroelectric plant downstream from the source of the intake water did not constitute an "addition" because it simply moved pollutants already in the water. Other courts have recognized the principle that an addition does not occur where pollution is merely passed "from one body of navigable water to

another."[2] *See, e.g., Committee to Save Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied sub nom. Members of Cal. Reg'l Water Quality Control Board v. Comm. to Save Mokelumne River*, 513 U.S. 873 (1994).

In contrast, the Eleventh Circuit held in this case that discharges from a pump that allows the South Florida Water Management District to move water from one side of a levee to the other for flood control, a "mere diversion in the flow of waters," required an NPDES permit. The Eleventh Circuit followed the recent Second Circuit decision in *Catskill Mountains*, concerning the releases of untreated water from New York City's Shandaken Tunnel, and *Dubois v. United States Dep't of Agric.*, a case involving a private company's diverting water from a pond and two other sources, using it to create snow for skiing, and then returning the water to the pond.[3] 280 F.3d at 1369, n.7.

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[2] This is consistent with the language of the statute, which refers to the addition of a pollutant to navigable "waters" rather than to navigable "water." 33 U.S.C. § 1362(12). The use of the collective term "waters" suggests that an "addition" requiring a permit would be an addition to the system of navigable waters as a whole, rather than the incidental transfer of pollutants from one body of water to another.

[3] *Amici*, representing cities and other public entities engaged in water supply, flood control, and other water management activities, believe that *Dubois* is distinguishable from *Miccosukee* and *Catskill Mountains*. In contrast to *amici's* activities, *Dubois* defendant Loon Mountain Recreation Corporation was processing the diverted water through snowmaking equipment. The Circuit Court found it significant that the water was "commercially exploited" between the time of its intake into the snowmaking equipment and the time it was released. 102 F.3d at 1297. The commercial exploitation meant that water was removed from the waters of the United States, and then was released into the waters of the United States after it was processed in the snowmaking equipment. *Id.* Because of the similarity of the principle involved, however, we include the case in our discussion of the split among the Circuits.



## II

## *GORSUCH* AND *CONSUMERS POWER* ARE NOT DISTINGUISHABLE FROM *MICCOSUKEE* AND *CATSKILL MOUNTAINS.*

In its attempt to reconcile *Gorsuch* and *Consumers Power* with its decision in this case, the Eleventh Circuit noted that the District of Columbia and Sixth Circuits in those earlier cases may have accorded EPA's interpretation of "addition" undue deference, since they were decided under the standard of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 280 F.3d at 1368, n.5. The Eleventh Circuit relied upon *Christensen v. Harris County*, 529 U.S. 576 (2000) for the proposition that EPA's interpretation is entitled to only a limited degree of deference, rather than great deference, because its interpretation was not subjected to the rigors of notice and comment rulemaking.

Although in *Gorsuch*, the District of Columbia Circuit Court of Appeals stated that the EPA interpretation was entitled to "great deference" (*Gorsuch*, 693 F.2d at 170), the decision itself demonstrates that the court did not simply defer to EPA. Rather, it contains a detailed analysis of the specific language of the Clean Water Act and its legislative history, as well as an evaluation of policy,

weighing the interests of preserving the integrity of the waters of the United States against the interests of states in water management. Accordingly, the *Gorsuch* court did not give undue deference to the EPA interpretation, despite its statement that EPA's position was entitled to "great deference." The *Gorsuch* court labored to ensure that it evaluated the competing interests of the Clean Water Act against local water management issues. Thus, *Gorsuch* is consistent with the *Christensen* standard of deference because the court gave deference to the EPA position, but only to the extent that it was persuaded that EPA's position was consistent with its analysis of the language, legislative history, and policy behind the Clean Water Act.

Because the *Gorsuch* court did not simply defer to the EPA interpretation of the Clean Water Act, *Christensen* does not support the Eleventh Circuit's departure from the principle that the mere transfer of untreated water that naturally contains pollutants is not regulated by the Clean Water Act. Similarly, in *Consumers Power*, while it discussed EPA's position in light of the then-applicable *Chevron* standard, the Sixth Circuit relied on a detailed analysis of congressional intent in reaching its decision that transfers of water from a dam used as a hydroelectric facility were not "additions" under the Clean Water Act. 862 F.2d at 586-588.

In contrast to the District of Columbia and Sixth Circuit Courts of Appeals, which considered several factors in addition to the EPA interpretation, the Eleventh Circuit did not conduct such a detailed analysis. Rather, it used *Christensen* to support its departure from the long line of cases interpreting the Clean Water Act, without any consideration of the legislative history or weighing of



interests.[4] For these reasons, *amici* respectfully submit that the decisions in *Gorsuch* and *Consumers Power* continue to represent the law of the District of Columbia and Sixth Circuits, and therefore that the recent decisions by the First, Second, and Eleventh Circuits create an inconsistency in interpretation of the Clean Water Act that should be resolved by this Court.

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[4] In *Catskill Mountains*, the Second Circuit declined to reach a conclusion as to the current status of the *Gorsuch* and *Consumers Power* decisions, but instead distinguished those cases on the theory that in those situations, unlike the discharges from New York City's Shandaken Tunnel, "the water from which the discharges came is the same as that to which they go." 273 F.3d at 492. The Second Circuit's distinction of these cases reflects a fundamental misunderstanding of how dams affect water. The Second Circuit distinguished *Gorsuch* and *Consumers Power* by concluding that confining water in a dam or reservoir, and then releasing that water, is fundamentally different from diverting water so that it flows from one body into another. To illustrate this point, the Second Circuit suggested that the dam situation is analogous to lifting soup with a ladle from a pot and then returning the ladleful to the same pot. *Catskill Mountains*, 273 F.3d at 492. The Second Circuit concluded that just as nothing has been added to the soup, nothing would be "added," within the meaning of the Clean Water Act, to the water into which a dam discharges. When water is impounded by a dam, however, its biochemistry is fundamentally altered. *See, e.g., Consumers Power*, 862 F.2d at 585 (recognizing that "storage dams ... actually transform the essential character of the water for its biological inhabitants"). Thus, the water released from a dam is likely to be as different from the downstream receiving waters, in terms of pollutant levels, as waters from distinct watersheds. Its use of the ladle example demonstrates that the Second Circuit did not understand the significance of the changes caused by damming.

## CONCLUSION

The case before the Court represents an issue of importance to municipalities and public entities across the nation involved in water supply, local water management, and flood control. The Circuit Courts of Appeals have reached different conclusions on the question of what constitutes an "addition" under the Clean Water Act. It is thus appropriate for this Court to resolve the confusion that has been created by the diverse decisions in similar cases.

For all the foregoing reasons, *amici* respectfully request that their motion for leave to file this brief be granted. *Amici* further respectfully request that the petition for certiorari be granted and that the decision of the Court of Appeals for the Eleventh Circuit, which has serious potential negative consequences for the many public agencies and authorities involved in water management for water supply and flood control, be reversed.

Respectfully submitted,

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In The
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF FOR THE LAKE WORTH DRAINAGE DISTRICT AND THE FLORIDA ASSOCIATION OF SPECIAL DISTRICTS AS AMICI CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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## MOTION OF LAKE WORTH DRAINAGE DISTRICT AND THE FLORIDA ASSOCIATION OF SPECIAL DISTRICTS FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

The Lake Worth Drainage District ("LWDD") and the Florida Association of Special Districts ("FASD"), by and through undersigned counsel and pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, respectfully move this Honorable Court for leave to file a Brief as *Amici Curiae* in support of the Petition for Writ of Certiorari filed with this Court by the South Florida Water Management District ("SFWMD").

Pursuant to Rule 37.2(a), Movants sought the consent of the opposing parties, Miccosukee Tribe of Indians and Friends of the Everglades, to the filing of an *Amici Curiae* Brief in support of the SFWMD's Petition for a Writ of Certiorari. Consent was withheld by the Miccosukee Tribe of Indians. No response has been received from Friends of the Everglades.

Movant FASD, a Florida Corporation, is an association consisting of 89 special districts in the State of Florida, including 39 of the State's water control districts. Movant LWDD, a member of FASD, is an independent taxing district of the State of Florida created pursuant to Special Act and Chapter 298, Florida Statutes. LWDD encompasses approximately 218 square miles in southeastern Palm Beach County, Florida. It includes within its boundaries, 11 municipalities, 20,000 acres of agricultural land and is bordered on the west by the Arthur R. Marshall Loxahatchee National Wildlife Refuge, otherwise known as Water Conservation Area #1 ("WCA-1").

LWDD's water management system provides comprehensive flood control and water supply protection to over 700,000 residents, 20,000 acres of prime agricultural land and 120,000 acres of urban development. It does this by maintaining approximately 511 miles of canals, 20 major water control structures and numerous other minor structures. A large portion of the activities of water control districts such as LWDD and those that are members of FASD is the movement of water for drainage and flood control purposes. That movement of water often occurs from one navigable body to another through structures which would meet the definition of "point source" under the Clean Water Act. These water control districts obtain surface water management permits from State of Florida permitting agencies, including the five water management districts, one of which is the Petitioner, SFWMD.

The decision of the Eleventh Circuit Court of Appeals from which SFWMD has sought a Petition for Writ of Certiorari will, if permitted to stand, have significant financial and operational impacts on water control districts such as Movants subjecting them to a new and intensive permitting process which has never before been deemed to be required by the Clean Water Act.

Given the fact that there are now conflicting opinions among the Circuit Courts of Appeals on the issues presented by SFWMD's Petition for Writ of Certiorari, as well as the fact that Movants are regulated by the non-point source permitting process provided for in the Clean Water Act, Movants have a significant interest in the outcome of the Petition presently before the Court.

For these reasons, the Movants, Lake Worth Drainage District and Florida Association of Special Districts,



respectfully request that this Honorable Court grant leave to file an *Amici Curiae* Brief on behalf of the Petitioner, South Florida Water Management District.

Respectfully submitted,

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TABLE OF CONTENTS


| | Page |
|---|---|
| MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF | 1 |
| INTEREST OF *AMICI CURIAE* | 1 |
| SUMMARY OF THE ARGUMENT | 4 |
| ARGUMENTS FOR GRANTING THE PETITION | 6 |
| THE ELEVENTH CIRCUIT ERRED, AND CREATED CONFLICT AMONG THE CIRCUITS, IN FINDING THE MOVEMENT OF WATER TO BE AN ADDITION OF POLLUTANTS FROM A POINT SOURCE SUBJECT TO NPDES PERMITTING | 6 |
| CONCLUSION | 13 |
| APPENDIX | App. 1 |

## TABLE OF AUTHORITIES

Page

CASES

*Appalachian Power Company v. Train*, 545 F. 2d 1345 (4th Cir. 1975) ..... 11

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F. 3d 481 (2nd Cir. 2001) ..... 12

*Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F. 3d 305 (9th Cir. 1993) ..... 9

*DuBois v. U.S. Department of Agriculture*, 102 F. 3d 1273 (1st Cir. 1996) ..... 12

*Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F. 3d 1364 (11th Cir. 2002) ..... 1

*National Wildlife Federation v. Consumers Power Company*, 862 F. 2d 580 (6th Cir. 1988) ..... 7, 11

*National Wildlife Federation v. Gorsuch*, 693 F. 2d 156 (D.C. Cir. 1982) ..... 11

*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ..... 6

STATUTES

33 U.S.C. §1251 *et seq.* ..... 2

33 U.S.C. §1251(b) ..... 6

33 U.S.C. §1313(b) ..... 6

33 U.S.C. §1313(d) ..... 9



## TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. §1313(e) ..... 6

33 U.S.C. §1314(f)(2)(F) ..... 7

33 U.S.C. §1329 ..... 6

33 U.S.C. §1362(6) ..... 8

33 U.S.C. §1362(12) ..... 6

33 U.S.C. §1362(14) ..... 2, 8

Chapter 298, Florida Statutes ..... 1

Section 403.067, Florida Statutes ..... 8

OTHER AUTHORITIES

*EPA, The Control of Pollution Caused by Hydrographic Modifications* (1973) ..... 7

## INTEREST OF *AMICI CURIAE*

*Amici Curiae*[1], Lake Worth Drainage District ("LWDD") and the Florida Association of Special Districts ("FASD"), submit this brief in support of the Petition for Writ of Certiorari presented by the South Florida Water Management District ("SFWMD") seeking review of the decision of the Eleventh Circuit Court of Appeals in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F. 3d 1364 (11th Cir. 2002).

In Florida today there are more than one thousand independent and dependent special districts, governed by more than 30 statutes and involving over 500 local governments. Special districts have a long history in the State of Florida and all were created in order to provide specific government services to a target population. Included among Florida's special districts are 96 water control districts and five water management districts.

FASD, a Florida Corporation, is an association consisting of 89 special districts in the State of Florida, including 39 of the State's water control districts. LWDD, a member of FASD, is an independent taxing district of the State of Florida created pursuant to Special Act and Chapter 298, Florida Statutes. LWDD encompasses approximately 218 square miles in southeastern Palm

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

Beach County, Florida. It includes within its boundaries, 11 municipalities, 20,000 acres of agricultural land and is bordered on the west by the Arthur R. Marshall Loxahatchee National Wildlife Refuge, otherwise known as Water Conservation Area #1 ("WCA-1").

LWDD's water management system provides comprehensive flood control and water supply protection to over 700,000 residents, 20,000 acres of prime agricultural land and 120,000 acres of urban development. It does this by maintaining approximately 511 miles of canals, 20 major water control structures and numerous other minor structures. The district's flood control discharges are through control structures to discrete water bodies such as Lake Worth Lagoon and the Hillsboro Canal, which are outside the boundaries of the LWDD system, as well as a number of lakes which are within its boundaries. The system is also operated to provide groundwater recharge for 24 municipal wellfields and for the prevention of salt water intrusion. LWDD relies for its water supply on deliveries from the U. S. Army Corps of Engineers' Central and Southern Florida Flood Control Project (C&SFCP), primarily WCA-1, which is separated from the LWDD system by a dike and three control structures, to maintain canal levels that recharge public water supply well-fields, to prevent salt water intrusion and to provide irrigation to a vital agricultural area in Palm Beach County. LWDD is the largest water control district in the State of Florida.

LWDD is one of 19 water control districts located within Palm Beach County alone. All of these districts utilize various major and minor water control structures such as pumps, spillways and canals which meet the definition of "point source" found in the Clean Water Act. 33 U.S.C. §1251 *et seq.*; see 33 U.S.C. §1362(14). These



districts serve both agricultural and urban needs. For example, there is the South Florida Conservancy District ("SFCD"). This water control district is located in the Everglades Agricultural Area south of Lake Okeechobee. The district's structures (pumps) provide the SFCD with the opportunity to withdraw water from Lake Okeechobee for agricultural water supply needs. Likewise, these pumps provide the district with the opportunity to discharge excess water from its geographic boundaries to Lake Okeechobee for flood control purposes. The district is equipped with pumps on its southernmost boundary which allows it to pump and discharge water from the Hillsboro and North New River Canals to the south. In addition, the SFCD is served by the S-236 pump station on the southern border of Lake Okeechobee.

There is also the Northern Palm Beach County Improvement District ("NPBCID") which services an urban area. This water control district is located in the eastern portion of Palm Beach County and extends to the county's boundary with Martin County to the north. The NPBCID is comprised of separate parcels separated by levees, each parcel equipped with pumps that allows it to withdraw or discharge water over district levees into either the C-17 or C-18 canals operated by SFWMD, which are navigable waters of the United States.

Another example of a water control district, this time beyond the boundaries of Palm Beach County, is the Joshua Water Control District ("JWCD") which serves agricultural areas. The JWCD is located in DeSoto County, west of Lake Okeechobee. This water control district operates under a gravity driven system using spillways, culverts and weirs to withdraw and discharge water throughout its boundaries. The water moves through this

district over a berm that delineates the district boundary and via a weir which allows the water to pass offsite under U.S. Highway 70. The water then moves by gravity through Prairie Creek and ultimately to the Peace River, both navigable waters of the United States.

LWDD and NPBCID have surface water management permits from the South Florida Water Management District ("SFWMD") which cover non-point source surface water discharges. JWCD has its permit from the Southwest Florida Water Management District. None of these water control districts, however, have ever been required to obtain a Section 402 National Pollution Discharge Elimination System ("NPDES") permit to operate. Under the holding of the Eleventh Circuit's decision below, and the broad language utilized in that holding, the question, and concern, is raised whether the LWDD and the FASD's water control district members will be required to obtain point source permits for each of their water control structures which merely transfer water from one navigable body of water to another. The Eleventh Circuit's decision below thus has a significant impact on these entities which it is important for this Court to consider in its determination whether to issue its writ of certiorari.

## SUMMARY OF THE ARGUMENT

The decision below, requiring as it does a NPDES point source permit when water containing pollutants is transferred through a point source from one navigable body to another, is contrary to the expressed intent of Congress in passing the Clean Water Act. That intent, which is to recognize, preserve and protect the primary



responsibilities and rights of states with regard to the use of land and water resources, has been recognized by Courts of Appeals including the Fourth, Sixth and the District of Columbia Circuits and by the Environmental Protection Agency ("EPA"), the agency charged with enforcing the Act. Recent cases from the First and Second Circuit Courts of Appeals, as well as the decision below of the Eleventh Circuit, are in conflict with these prior decisions, the language of the Act and the Congressional intent.

If permitted to stand, the Eleventh Circuit's opinion below will have a significant impact on *Amici Curiae* and other similarly situated governmental water control districts in the State of Florida, requiring applications for multiple NPDES permits contrary to long-standing policies and procedures and in conflict with the federal/state system of preventing and reducing pollution set out in the Clean Water Act. Given the conflicting decisions of the various Circuit Courts of Appeals and the significant adverse operational and economic impacts on governmental water management and water control entities in Florida and throughout the country, review by this Court is necessary to resolve the conflicts and clarify the reach of the NPDES permit requirements in the circumstances presented.

## ARGUMENTS FOR GRANTING THE PETITION

### THE ELEVENTH CIRCUIT ERRED, AND CREATED CONFLICT AMONG THE CIRCUITS, IN FINDING THE MOVEMENT OF WATER TO BE AN ADDITION OF POLLUTANTS FROM A POINT SOURCE SUBJECT TO NPDES PERMITTING.

The impact of the Eleventh Circuit's expansive "but for" interpretation of the "addition . . . from" element set forth in 33 U.S.C. §1362(12) requiring a NPDES point source permit to transfer water from one navigable body to another, is vividly demonstrated by a review of the requirements it would place on LWDD, the dozens of other water control districts in the State of Florida and the five water management districts, including SFWMD. It is a review of these impacts on literally hundreds of governmental entities which also vividly demonstrates that the Eleventh Circuit's interpretation is not what Congress intended in the distinctions it made between point source and non-point sources of pollutants and pollution.

As noted by the SFWMD in its petition, the states are directed to address non-point source pollution but are left to determine for themselves the nature of the steps to take. 33 U.S.C. §§1313(b) and (e), 1329. The expressed policy of the Congress is to recognize, preserve and protect the primary responsibilities and rights of states not only to prevent and reduce pollution but to plan the development and use of land and water resources and to allocate quantities of water within their jurisdictions. 33 U.S.C. §1251(b). This Congressional intent was expressly recognized by the Court in the recent decision of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 174, 121 S.Ct. 675, 684 (2001). In the State of Florida, the primary vehicles for



exercising these rights and responsibilities are the water management districts. Water control districts, such as LWDD, which are permitted by water management districts, play a similar crucial role at the local government level in the implementation of these plans and responsibilities.

To impose upon these water management entities the requirement of a NPDES point source permit every time water is transferred through a point source from one navigable body to another would place an unbearable burden on these districts, would interfere with the State's management of these resources and would, in essence, preempt, by judicial fiat, the expressed intent of Congress. Under the holding of the decision below, any transfer of water from one body to another that introduces an already existing pollutant would require a NPDES permit. This is so even in those situations, as with the S-9 pump station, where the two bodies of water would be one but for a man-made structure which separates them. The changes to the movement, flow or circulation of these navigable waters caused by the construction of man-made structures or flow diversion facilities, are intended to be and have been controlled by the states under non-point source procedures and methods developed with guidance from the EPA. 33 U.S.C. §1314(f)(2)(F); *National Wildlife Federation v. Consumers Power Company*, 862 F. 2d 580, 588 (6th Cir. 1988); see also, *EPA, The Control of Pollution Caused by Hydrographic Modifications* (1973).

Just as the SFWMD does, LWDD and the other water control districts in the State receive water which can, and

most often will, contain pre-existing pollutants[2], which were naturally occurring or added from other sources upstream. These waters are then transferred through structures, which meet the definition of "point-sources", into other navigable bodies of water without the addition of any new pollutants or, in the case of, for example, agricultural operations, the addition of pollutants from exempt activities. See 33 U.S.C. §1362(14). Under the expansive language of the decision below, a NPDES permit would be required at each point-source where such a transfer occurs. This would, for all intents and purposes, usurp the State's role in the overall management of its water resources.

For a water control district such as LWDD, a requirement to obtain a NPDES point source permit for its movement of water from one navigable surface water body to another would impose significant financial and operational burdens. As noted, LWDD, which has a large number of water control structures and moves water to and from a number of navigable bodies, is required to obtain a surface water management permit from SFWMD. Landowners within the district who discharge into the district's canals may also be subject to the extensive total maximum daily load ("TMDL") program regulatory requirements
of Section 403.067, Florida Statutes, which addresses surface waters that do not meet the State's water quality

[2] "Pollutant" is defined in 33 U.S.C. §1362(6) as meaning "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."



standards. This provision of Florida law, addressing both point source and non-point source pollution, is a state program in accordance with the planning requirements of Section 303(d) of the Clean Water Act. 33 U.S.C. §1313(d).

To now impose the additional regulatory requirement of obtaining a NPDES point source permit for the transfer of water from one body to another would place LWDD and other water control districts in the position of not only having to engage in a separate and costly permitting process, but of potentially having to treat water at each point source to remove already existing pollutants. And, at least based on the Ninth Circuit's view, this would be the case even where there is no net increase in the level of pollutants in the receiving body of water. See, *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F. 3d 305 (9th Cir. 1993). The point source/non-point source regulatory system created by the Clean Water Act and its implementation by the state and federal governments militate against the Eleventh Circuit's expansive view of the NPDES permitting process and the inordinate and unwarranted regulatory burden it would place on state and local water management and water control entities.

To say that a NPDES point source permit is not required for the movement of water between waters of the United States is not to say that the introduction of pollutants into such waters is beyond regulatory authority. As noted above, the states are authorized and even required to address waters that do not meet state water quality standards.

But the Clean Water Act has also been applied to address a major source of pollutants that enter United

States waters – upland storm water runoff. On November 16, 1990, EPA published in the Federal Register its new storm water NPDES regulations which established a permitting system for storm water discharges from municipal separate storm sewer systems (known as MS4s). The application of this program is described in a series of letters between LWDD, the Florida Department of Environmental Regulation (the predecessor agency to the present Department of Environmental Protection) and the EPA. (App. 1-19). The EPA explained that LWDD and other districts would be required to submit NPDES applications for storm water discharges if they owned or operated a system that met the definition of a municipal separate storm sewer and was within one of ten listed Florida counties (including Palm Beach County). Since transfers of water from waters of the State and of the United States to other waters of the State and the United States are not considered within the MS4 permit application requirement, LWDD was not required to apply for such permits.

Nonetheless, the MS4 program does provide a regulatory vehicle for addressing the initial introduction of pollutants from upland sources into waters of the United States from storm water runoff, just as the NPDES point source permit process addresses the *initial* discharge of pollutants from upland sources into water from point sources. Once these pollutants have entered the waters of the United States, or are otherwise naturally occurring (e.g., "biological materials"), no additional benefit is derived from requiring point source permits every time water is moved from one navigable water body to another, as the Eleventh Circuit would require.

Historically, EPA has never required LWDD or other water control districts to obtain a NPDES point source



permit to transfer water from one navigable body to another. In its exposition to LWDD of its then new storm water discharge permit, EPA made it clear that transfer of water from waters of the State and the United States to other waters of the State and the United States did not fall within those permitting requirements. While EPA had established a new NPDES permitting system to deal with municipal separate storm sewer systems, it did not alter the NPDES point source permit system as it had historically been interpreted and applied – i.e., that a point source permit is not required for the movement of the waters of the United States between each other. To impose such a requirement now would have a drastic impact on extensive and far-reaching programs and systems which have been developed and implemented within the present, already complex, regulatory system.

The thorough and extensive discussion of the legislative history of the Clean Water Act set forth by the District of Columbia Circuit in *National Wildlife Federation v. Gorsuch*, 693 F. 2d 156 (D.C. Cir. 1982), as adopted and followed by the Fourth and Sixth Circuits in *Appalachian Power Company v. Train*, 545 F. 2d 1345 (4th Cir. 1975) and *National Wildlife Federation v. Consumers Power Company*, *supra*, demonstrates that the intent of Congress in passing the Clean Water Act was not to require a NPDES point source permit for the transfer of water containing pre-existing pollutants from one navigable body to another. There is nothing in *Gorsuch*, *Consumers Power*, *Appalachian Power* or the language of the Clean Water Act itself which would indicate that that situation is strictly limited to dams. Nor, given the often similar purposes of dams to the levees, pumps, spillways, gates and other water management structures utilized by LWDD, Florida's

water management districts and other water control districts, is there a logical basis for any such distinction.

In its 30 years, the Clean Water Act has never been interpreted by EPA to require a NPDES permit for the mere transfer of water from one navigable body to another. Surface water management systems have been established and flood control projects constructed under state water management programs utilizing the non-point source permitting process to address water quality issues in such circumstances. Nothing has changed by way of Congressional enactment to modify that process. In essence, the Eleventh Circuit's extension of the NPDES point source permit process, expanding on cases such as *DuBois v. U.S. Department of Agriculture*, 102 F. 3d 1273 (1st Cir. 1996) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F. 3d 481 (2nd Cir. 2001), is tantamount to amending the Clean Water Act, a process not properly within the ambit of judicial authority. In these circumstances, this Court should accept jurisdiction of the case to determine the propriety under the Clean Water Act of the Eleventh Circuit's far reaching change to what have been long-standing policies and procedures which have been implemented by the EPA, the Army Corps of Engineers and, in the case of Florida, the Florida Department of Environmental Protection, its water management districts and its various water control districts pursuant to the permits they receive from the State permitting agencies.



## CONCLUSION

In addition to being in conflict with decisions of the Fourth, Sixth, and District of Columbia Circuits, the Eleventh Circuit's opinion below is creating confusion and disruption in the operation of many, if not all, of the over 100 governmental water management and water control entities in the State of Florida. Since the issuance of the Eleventh Circuit's opinion, two additional SFWMD pump stations (S-2 and S-3) have become the subject of citizen lawsuits and at least nine notices of intent to bring additional lawsuits have been filed. The prospect of litigation over hundreds of water control structures, the uncertainty of what circumstances require a NPDES permit and which do not in light of the conflicting pronouncements emanating from the various Courts of Appeals, and the drastic revisions to the permitting process which will necessarily result from the Eleventh Circuit's decision, will have a profound impact on how water is managed in the State of Florida – an impact that has not been demonstrated would be beneficial or was intended by Congress in enacting the Clean Water Act.

For the reasons set forth herein, as well as those set forth in the Petition for a Writ of Certiorari, *Amici Curiae*

respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH G. SPILLIAS
*Counsel of Record*
TERRY E. LEWIS
STEPHEN A. WALKER
MICHELLE DIFFENDERFER
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd.
Suite 1000
West Palm Beach, Florida 33401
(561) 640-0820
*Counsel for Amici Curiae,*
*Lake Worth Drainage District*
*and Florida Association of*
*Special Districts*

November 2002



***LWDD***
LAKE WORTH
DRAINAGE DISTRICT

Board of Supervisors
C. Stanley Weaver
Kermit Dell
John I. Whitworth III
Secretary/Manager
William G. Winters
Assistant Manager
Richard S. Wheelihan
Attorney
Perry & Schone, P.A.

13081 MILITARY TRAIL
DELRAY BEACH, FLORIDA 33484

May 7, 1991

Scott Benyon
Florida Department of Environmental Regulation
Re: NPDES/LWDD

Dear Scott:

This letter is being sent to request from your Department a written confirmation that it is the determination of FDER that the waters of the Lake Worth Drainage District are waters of the State of Florida and further that your Department is in agreement with E.P.A. that the Lake Worth Drainage District is not required to make application for a permit as required by the NPDES regulations.

This District was created in 1915 under a special act of the Florida Statues (61.1747). Since that time the Lake Worth Drainage District has operated and maintained a system of canals which acts as a conveyance system carrying only stormwater. This operation of Lake Worth Drainage District is permitted by the South Florida Water Management District in accordance with Florida Statues Chapters 373 and 401. At no time does this District treat

or accept direct stormwater that falls within it's 218 square miles. All stormwater from public and/or private systems are required to be treated prior to discharging into our systems.

Further, the District has been required at all times to secure permits from your agency and the Corp. of Engineers to perform any works within District rights-of-way for any type of construction. Therefore your agency and the Corp. have always categorized the Lake Worth Drainage District as consisting of State and U.S. waters.

After several meetings with Roosevelt Childress, Chief South Area Permits Unit Facilities Performance Branch Water Management Division of E.P.A., Bart Bibler of FDER and the Lake Worth Drainage District, it was the consensus of these agencies' representatives that the Lake Worth Drainage District should not be required to make application for either phase of the NPDES permit program since the waters of the Lake Worth Drainage District are waters of the State of Florida and therefore are waters of the United States.

It would be appreciated if I could receive a written confirmation of FDER's determination that the waters of Lake Worth Drainage District are waters of the State of Florida and further that it is the position of FDER that Lake Worth Drainage District should not be required to obtain a NPDES permit as soon as possible so I may present your letter and the Lake Worth Drainage District's position letter to E.P.A. within the immediate future.



If I can be of any assistance, please do not hesitate in calling me.

Sincerely,

LAKE WORTH
DRAINAGE DISTRICT

/s/ Mark A. Perry
Mark A. Perry
Attorney for LWDD

MAP:jma

[LOGO] ***Florida Department of Environmental Regulation***

Southeast District • 1900 S. Congress Ave., Suite A • West Palm Beach, Florida 33406

Lawton Chiles, Governor Telephone No. 407/433-2650
Carol M. Browner, Secretary

May 23, 1991

Mr. William G. Winters
Lake Worth Drainage District
13081 Military Trail
Delray Beach, FL 33484

Dear Mr. Winters:

RE: NPDES PERMIT REQUIREMENTS

We have reviewed the drainage network of the Lake Worth Drainage District, and it is our opinion that all waters and wetlands connected to those waters within your system are waters of the state; and therefore are waters of the United States. Historically, the Department has always required permits for dredge and fill activities within these waters. These permits have always required that the proposed activities must meet state water Quality Standards for Class III Waters as stated in 17-312, Florida Administrative Rule.

I hope this letter will be of some assistance to you as your organization deals with the Environmental Protection Agency in Atlanta. If I can be of further assistance, please contact *Marion Hedgepeth* or myself at (407) 433-2650.



Sincerely,

/s/ J. Scott Benyon
J. Scott Benyon
Deputy Assistant Secretary

cc: Steve Hall, DER Tallahassee
Palm Beach County Department of Environmental Resources Management

May 29, 1991

Mr. Roosevelt Childress, Chief
South Area Permits Unit
Facilities Performance Branch
Water Management Division
United States Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Re: Lake Worth Drainage District, A Special Taxing District of the State of Florida/NPDES Permit

Dear Roosevelt:

As you are aware, this office is general counsel for the Lake Worth Drainage District, a special taxing district of the State of Florida, located in Palm Beach County.

Enclosed you will find a copy of a letter received by the Lake Worth Drainage District from J. Scott Benyon, Deputy Assistant Secretary from the Florida Department of Environmental Regulation confirming the fact that it is the position of the State of Florida that all waters contained within the Lake Worth Drainage District system are waters of the State of Florida, and therefore are waters of the United States. Also, please be advised that the Lake Worth Drainage District does not own or operate any municipal stormwater collection system feeding into State waters or Federal waters and therefore the Lake Worth Drainage District does not fall within the requirements of being required to submit an application for a permit under the NPDES permit program.

On behalf of the Lake Worth Drainage District, I respectively request written confirmation from your agency stating that the Lake Worth Drainage District



shall not be required to submit an application for permit, as set forth under the EPA regulations in the National Pollutant Discharge Elimination System permit program. Since the waters within the Lake Worth Drainage District system are State waters and therefore Federal waters and the Lake Worth Drainage District does not own or operate any municipal stormwater collection system feeding into State waters the Lake Worth Drainage District should not be required to submit for a permit.

It would be appreciated if the Lake Worth Drainage District could receive written confirmation from your agency within the immediate future, setting forth the fact that the Lake Worth Drainage District will not be required to submit an application for a NPDES permit.

If you should have any questions regarding the contents of this letter or if I can be of any further assistance please do not hesitate in contacting this office.

Sincerely,

LAKE WORTH
DRAINAGE DISTRICT

Mark A. Perry
Attorney for L.W.D.D.

MAP:jma
Enclosure
cc: William G. Winters, Manager

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUN 10 1991

REF: 4WM-FP

Mr. William Winters
Lake Worth DD
13081 Military Trail
Delray Beach, FL 33484

Dear Addressee:

Region IV of the Environmental Protection Agency (EPA) has received several letters and calls requesting clarification of the responsibilities and requirements of the 298 Districts (and other special districts operating in a similar capacity), based on EPA's new storm water National Pollutant Discharge Elimination System (NPDES) regulations which were published in the *Federal Register* on November 16, 1990. Also, there appears to be some remaining confusion among the 298 Districts about the options available for municipalities and 298 Districts to group themselves to submit applications for storm water discharges from municipal separate storm sewer systems (MS4's).

A 298 District (or special district) is required to submit a MS4 application *only* if it owns or operates a system that meets the definition of a municipal separate storm sewer and is within one of the ten (10) counties listed in Attachment A. (See Attachment B for the definition of a



municipal separate storm sewer.) Waters of the State and waters of the United States, including canals that are considered waters of the State, are not MS4's. Therefore, each 298 District (or special district) should evaluate their system based on the definition of a municipal separate storm sewer, and make the determination of whether or not they own or operate a MS4. If it is determined that no MS4 is owned or operated, then no application is required. However, if it is determined that a MS4 is owned or operated, the 298 District is required to submit an application for the discharges from its MS4.

In order to clarify our intent in *recommending* that the county be "lead applicant", please understand that it was only a recommendation. We assumed the county would be the one municipal entity that may have the resources, expertise and contacts with all the municipalities within the county to be able to coordinate completion of a single MS4 application. (By definition, 298 Districts and other special districts are considered municipalities for the purpose of obtaining NPDES permit coverage for MS4 discharges.) All municipalities are certainly entitled to submit an individual application; however, you must discuss responsibilities for any shared outfalls with any adjacent municipality. Identification as the "lead applicant" carries with it no designated or implied authorities over any other municipality in the county, whether an application is submitted in conjunction with the "lead applicant" or separately. All participants in the submittal of a single application are considered co-applicants.

As a result of comments received at our individual meetings with the potential municipal applicants in the counties, any group of municipalities in a county can participate as co-applicants; this will include Chapter 298

Special Districts that own and operate MS4's that are not waters of the U.S. For Part 1 of the application, each set of co-applicants is required to identify and sample 250 field screening points (500 field screening points if one of the co-applicants is listed in the aforementioned *Federal Register* as a large MS4). These field screening points are to be distributed among the co-applicants as agreed upon by them. The five (5) to ten (10) representative sampling locations for Part 2 of the application should be handled in a similar manner. This is a change from our previous requirement which offered municipalities only the following two options for submitting MS4 applications: (1) participate with the county and share the total number of field screening points required for the county; or (2) submit an individual application. The Part 1 application deadline for all municipalities not specifically listed in the storm water regulations is May 18, 1992, and Part 2 is due by May 17, 1993.

If you determine that your district does not own or operate any system or portion of a system that is described by the definition of a municipal separate storm sewer, please notify our office by letter. Also enclosed is a list of the active NPDES facilities in your county for your use in completing the MS4 application. The industrial and municipal storm water application guidance manuals and the lists of waterbodies with known water quality impacts in your county, if any, will be mailed to you soon. If you or your staff have any questions or comments please contact the appropriate member of my staff as shown on Attachment A.



Sincerely,

/s/ Roosevelt Childress
Roosevelt Childress, Acting Chief
Permits Section
Facilities Performance Branch
Water Management Division

Enclosures

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ATTACHMENT A

Listed below are the ten (10) Florida counties which are required to submit an NPDES application for discharges from their MS4's (all municipalities within these counties are required to submit MS4 discharge applications as well). Also shown are the permit writers assigned to each county.

| County | Permit Writer | Telephone # |
|---|---|---|
| Broward | Chris Thomas | 404/347-3633 |
| Dade | Tammy Bradley-Moore | 404/347-3866 |
| Duval | Karrie-Joe Shell | 404/347-3633 |
| Escambia | Angie Fugo | 404/347-3379 |
| Hillsborough | Jeannie McNeill | 404/347-2913 |
| Orange | Brenita Richardson | 404/347-3379 |
| Palm Beach | Chris Thomas | 404/347-3633 |
| Pinellas | Jeannie McNeill | 404/347-2913 |
| Polk | Angie Fugo | 404/347-3379 |
| Sarasota | Tammy Bradley-Moore | 404/347-3866 |

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ATTACHMENT B

DEFINITION OF "MUNICIPAL SEPARATE STORM SEWER"

Reference 40 CFR 122.26(b)(8)

*MUNICIPAL SEPARATE STORM SEWER* means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribe organization, or a designated and approved management agency under section 208 of the Clean Water Act (CWA) that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2



(LOGO)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUN 24 1991

REF: 4WM-FP

Mr. Mark A. Perry
Attorney for Lake Worth Drainage District
1308 Military Trail
Delray Beach, Florida 33484

Dear Mr. Perry:

Thank you for your letter of May 29, 1991, on behalf of Lake Worth Drainage District. I have enclosed a copy of a letter that was sent to all Chapter 298 and similar districts. Lake Worth Drainage District's letter was dated June 10, 1991. The referenced June 10, 1991, letter states that if a district determines it does not own or operate any portion of a system which is considered to be a municipal separate storm sewer (see Attachment B of the enclosed letter), then it should provide written notice to our office of such determination. The June 10, 1991, letter also states that if a district makes the determination that no municipal separate storm sewer system (MS4) is owned or operated, then no MS4 application is required.

Your letter of May 29, 1991, may serve as the written notification we are requesting. Based on your determination that Lake Worth Drainage District does not own or operate a MS4, no MS4 application is required. If you have

any questions please call Mr. Chris Thomas of my staff at 404/347-3633.

Sincerely,

/s/ Roosevelt Childress
Roosevelt Childress, Acting Chief
Permits Section
Facilities Performance Branch
Water Management Division

Enclosure (1)

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(LOGO)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

JUN 10 1991

REF: 4WM-FP

Mr. William Winters
Lake Worth DD
13081 Military Trail
Delray Beach, FL 33484

Dear Addressee:

Region IV of the Environmental Protection Agency (EPA) has received several letters and calls requesting clarification of the responsibilities and requirements of the 298 Districts (and other special districts operating in a similar capacity), based on EPA's new storm water National Pollutant Discharge Elimination System (NPDES) regulations which were published in the *Federal Register* on November 16, 1990. Also, there appears to be some remaining confusion among the 298 Districts about the options available for municipalities and 298 Districts to group themselves to submit applications for storm water discharges from municipal separate storm sewer systems (MS4's).

A 298 District (or special district) is required to submit a MS4 application *only* if it owns or operates a system that meets the definition of a municipal separate storm sewer and is within one of the ten (10) counties listed in Attachment A. (See Attachment B for the definition of a

municipal separate storm sewer.) Waters of the State and waters of the United States, including canals that are considered waters of the State, are not MS4's. Therefore, each 298 District (or special district) should evaluate their system based on the definition of a municipal separate storm sewer, and make the determination of whether or not they own or operate a MS4. If it is determined that no MS4 is owned or operated, then no application is required. However if it is determined that a MS4 is owned or operated, the 298 District is required to submit an application for the discharges from its MS4.

In order to clarify our intent in *recommending* that the county be "lead applicant", please understand that it was only a recommendation. We assumed the county would be the one municipal entity that may have the resources, expertise and contacts with all the municipalities within the county to be able to coordinate completion of a single MS4 application. (By definition, 298 Districts and other special districts are considered municipalities for the purpose of obtaining NPDES permit coverage for MS4 discharges.) All municipalities are certainly entitled to submit an individual application; however, you must discuss responsibilities for any shared outfalls with any adjacent municipality. Identification as the "lead applicant" carries with it no designated or implied authorities over any other municipality in the county, whether an application is submitted in conjunction with the "lead applicant" or separately. All participants in the submittal of a single application are considered co-applicants.

As a result of comments received at our individual meetings with the potential municipal applicants in the counties, any group of municipalities in a county can participate as co-applicants; this will include Chapter 298



Special Districts that own and operate MS4's that are not waters of the U.S. For Part 1 of the application, each set of co-applicants is required to identify and sample 250 field screening points (500 field screening points if one of the co-applicants is listed in the aforementioned *Federal Register* as a large MS4). These field screening points are to be distributed among the co-applicants as agreed upon by them. The five (5) to ten (10) representative sampling locations for Part 2 of the application should be handled in a similar manner. This is a change from our previous requirement which offered municipalities only the following two options for submitting MS4 applications: (1) participate with the county and share the total number of field screening points required for the county; or (2) submit an individual application. The Part 1 application deadline for all municipalities not specifically listed in the storm water regulations is May 18, 1992, and Part 2 is due by May 17, 1993.

If you determine that your district does not own or operate any system or portion of a system that is described by the definition of a municipal separate storm sewer, please notify our office by letter. Also enclosed is a list of the active NPDES facilities in your county for your use in completing the MS4 application. The industrial and municipal storm water application guidance manuals and the lists of waterbodies with known water quality impacts in your county, if any, will be mailed to you soon. If you or your staff have any questions or comments please contact the appropriate member of my staff as shown on Attachment A.

Sincerely,

/s/ Roosevelt Childress, Acting Chief
Permits Section
Facilities Performance Branch
Water Management Division

Enclosures

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## ATTACHMENT A

Listed below are the ten (10) Florida counties which are required to submit an NPDES application for discharges from their MS4's (all municipalities within these counties are required to submit MS4 discharge applications as well). Also shown are the permit writers assigned to each county.

| County | Permit Writer | Telephone # |
|---|---|---|
| Broward | Chris Thomas | 404/347-3633 |
| Dade | Tammy Bradley-Moore | 404/347-3866 |
| Duval | Karrie-Jo Shell | 404/347-3633 |
| Escambia | Angie Fugo | 404/347-3379 |
| Hillsborough | Jeannie McNeill | 404/347-2913 |
| Orange | Brenita Richardson | 404/347-3379 |
| Palm Beach | Chris Thomas | 404/347-3633 |
| Pinellas | Jeannie McNeill | 404/347-2913 |
| Polk | Angie Fugo | 404/347-3379 |
| Sarasota | Tammy Bradley-Moore | 404/347-3866 |

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## ATTACHMENT B

## DEFINITION OF "*MUNICIPAL SEPARATE STORM SEWER*"

Reference 40 CFR 122.26(b)(8)

*MUNICIPAL SEPARATE STORM SEWER* means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribe organization, or a designated and approved management agency under section 208 of the Clean Water act (CWA) that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

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MOTION FILED
NOV 2 5 2002

No. 02-626 (5)

In The
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE NATIONAL WATER RESOURCES ASSOCIATION, WESTERN COALITION OF ARID STATES, WESTERN URBAN WATER COALITION, AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, the National Water Resources Association (NWRA), the Western Coalition of Arid States (WESTCAS), the Western Urban Water Coalition (WUWC) and the Metropolitan Water District of Southern California (MWD) request leave to file the accompanying brief as *amici curiae* in support of Petitioner South Florida Water Management District's petition for a writ of certiorari. Consent for *amici* participation was requested of all parties on November 7, 2002, but was denied by respondents Miccosukee Tribe of Indians and Friends of the Everglades, Inc.

Respectfully submitted,

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## QUESTION PRESENTED

Whether the transfer of untreated water from one natural source to another constitutes an "addition" of pollutants under the federal Clean Water Act, 33 U.S.C. Section 1251, *et seq.*

TABLE OF CONTENTS


| | Page |
|---|---|
| MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* | 1 |
| INTEREST OF *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 7 |
| ARGUMENT | 8 |
| I. The Eleventh Circuit Decision Cannot be Reconciled with Opposing Opinions in the D.C. Circuit, the Fourth Circuit and the Sixth Circuit | 8 |
| II. The Eleventh Circuit Opinion is Contrary to the Federal/State Balance Governing the Use of Water | 10 |
| III. There Exists no Clear Congressional Statement of Intent Endorsing Such Interference with State Laws | 12 |
| CONCLUSION | 14 |




TABLE OF AUTHORITIES


| CASES: | Page |
|---|---|
| Appalachian Power Company v. Train, 545 F.2d 1351 (4th Cir. 1976) | 8 |
| California Oregon Power Company v. Beaver Portland Cement Company, 295 U.S. 142 (1935) | 7, 9, 10, 12 |
| California v. United States, 438 U.S. 645 (1978) | 10 |
| Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.2d 481 (2nd Cir. 2001) | 10 |
| Colorado v. New Mexico, 459 U.S. 176 (1982) | 6 |
| Committee to Save Mokelumne River v. East Bay Utilities, 13 F.3d 305 (9th Cir. 1993) | 13 |
| Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1968) | 13 |
| Froebel v. Meyer, 217 F.3d 928 (7th Cir. 2000) | 8 |
| Gregory v. Ashcroft, 501 U.S. 452 (1991) | 7, 12 |
| Miccosukee Tribe of Indians v. South Florida Water Management District, 280 F.3d 1364 (11th Cir. 2002) | 1, 5 |
| National Wildlife Federation v. Consumer's Power, 862 F.2d 580 (6th Cir. 1988) | 8 |
| National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) | 7, 8, 9 |
| Nebraska v. Wyoming, 325 U.S. 589 (1945) | 6 |
| Solid Waste Agency v. Army Corps of Engineers, 531 U.S. 159 (2001) | 12 |
| United States v. Law, 979 F.2d 977 (4th Cir. 1992) | 8 |

TABLE OF AUTHORITIES – Continued

Page

United States v. Lopez, 514 U.S. 549 (1995) ..... 12

Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) ..... 12

Wyoming v. Colorado, 259 U.S. 419 (1922) ..... 6

STATUTES:

Clean Water Act, 33 U.S.C. § 1251, *et seq.* ..... 7

Clean Water Act, 33 U.S.C. § 1251(g) ..... 7, 10, 11

Clean Water Act, 33 U.S.C. § 1313(d) ..... 11

Clean Water Act, 33 U.S.C. § 1342 ..... 14

Clean Water Act, 33 U.S.C. § 1370 ..... 11

40 C.F.R. § 131.12 ..... 12

Colorado River Compact, 42 Stat. 171 (1921) ..... 6

Republican River Compact, 57 Stat. 86 (1943) ..... 6

Rio Grande River Compact, 53 Stat. 785 (1939) ..... 6

South Platte River Compact, 44 Stat. 195 (1926) ..... 6

Upper Colorado River Compact, 63 Stat. 31 (1949) ..... 6

OTHER:

Vranesh's Colorado Water Law, § 1.2 (1999) ..... 10



## INTEREST OF *AMICI CURIAE*

*Amici curiae*, the National Water Resources Association, the Western Coalition of Arid States, the Western Urban Water Coalition and the Metropolitan Water District of Southern California submit this brief in support of Petitioner South Florida Water Management District's Petition for a Writ of Certiorari seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1]

NWRA is a voluntary organization of state water associations whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the Reclamation states of the Western United States. Its members range from the Metropolitan Water District of Southern California, with a service area population of approximately 17 million, to Dirk Parkinson, a member of the Idaho Water Users Association and the owner of the McCormick Rowe Ditch in St. Anthony, Idaho, which is used to irrigate 240 acres of farmland.[2] As described in greater detail below, NWRA

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

[2] Other NWRA members include the Arizona Cattlemen's Association (AZ), the Central Arizona Water Conservancy District (AZ), the Central Arizona Water Conservation District (AZ), Coachella Valley Water District (CA), Glen-Colusa Irrigation District (CA), Imperial Irrigation District (CA), East Bay Municipal Utility District (CA), San

(Continued on following page)

members directly engage in, or are the recipients of water from, innumerable transbasin water diversion projects.[3] If these diversion and storage activities were effectively halted or became prohibitively expensive to operate due to the need to obtain an NPDES permit, NWRA members would be unable to meet essential domestic, agricultural and industrial water demands.

The Mission Statement of WESTCAS provides that it is "the voice of water quality in the Arid West" and an advocate for "laws, regulations and policies that ensure sustainable supplies of water for the Arid West and protect public health and the environment." WESTCAS was formed over ten years ago in order to appropriately address water quality issues in an area of the country where precipitation is oftentimes less than ten inches per year and, as a consequence, unique "arid ecosystems" are the norm. WESTCAS members include numerous water and wastewater agencies, such as the City of Phoenix, Tucson Water, the Salt River Project, Eastern Municipal Water District, Los Angeles County Sanitation District, the

Diego County Water Authority (CA), Colorado River Water Conservation District (CO), City of Fort Collins (CO), Montana Water Users Association (MT), Garrison Diversion Conservation District (ND), Middle Rio Grande Conservancy District (NM), Las Vegas Valley Water District (NV), Talent Irrigation District (OR), Brazos River Authority (TX), Provo River Water Users Association (UT), and Methow Valley Irrigation District (WA).

[3] NWRA has maintained a close working relationship with the U.S. Bureau of Reclamation, as many of its members are the owners, operators or beneficiaries of Reclamation water projects, including projects with significant transbasin components. See, e.g., Colorado's Frying-Pan Arkansas Project, California's Friant-Kern Canal (part of Central Valley Project), and New Mexico's San Juan Chama Project.



Sweetwater Authority, Denver Metro Wastewater District, Clark County Sanitation District, the cities of Albuquerque and Santa Fe, and El Paso Water Utilities. Many WESTCAS members depend upon transbasin water diversions both to meet municipal water supply requirements and to sustain, by virtue of water transport or wastewater discharge, riparian ecosystems that have developed in ephemeral or intermittent stream systems and are now dependent on the continued delivery of "foreign" or imported waters.

The Western Urban Water Coalition is an association of the largest municipal water utilities in the Western United States. The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Utah and Washington, including those residing within the cities of Phoenix, Denver, San Diego, Los Angeles, San Francisco, Oakland, Las Vegas, Salt Lake City, Tucson and Seattle. WUWC members own and operate water management, water supply and hydroelectric projects. These projects consist of water conduits and reservoirs, including transbasin water diversion facilities. The continued unimpeded operation of these facilities is essential to the continued ability of WUWC members to fulfill their mission of servicing the water resource-related needs of the major population centers of the Western States.

The Metropolitan Water District of Southern California is a public corporation which, through its 26 member public agencies, provides water to 17 million people in Southern California. MWD owns and operates an extensive system of aqueducts, canals and water conveyance

structures that are essential to supply the water consumption needs of Southern California.

In the West, diversion of water in the spring as mountain snows melt, its transport through tunnels, canals, pipelines and natural stream systems to the place of need, and its subsequent storage in reservoirs until the time of use are all essential steps in meeting water supply requirements. According to the Upper Colorado River Commission, in the Upper Colorado River Basin alone there exists at least 36 transbasin diversions which remove approximately 700,000 acre feet ("a/f") of water from the basin of origin in any one year and transport it to the basin of receipt. Included within these diversions are the transbasin projects operated by the Northern Colorado Water Conservancy District, whose Colorado Big Thompson Project transports an average of 228,000 a/f per year to irrigate over 600,000 acres,[4] the waterworks of the City of Colorado Springs, whose transbasin diversions in 2001 totaled approximately 75,000 a/f, representing almost eighty (80) percent of the City's total water supply,[5] and the City of Denver's Roberts and Moffat Tunnels, which convey in excess of 200,000 a/f annually for municipal use, thereby meeting forty-five percent of the Denver municipal

[4] The Northern District, an NWRA member, also operates the Windy Gap transbasin diversion project which is designed to provide approximately 48,000 a/f of water per year on average for municipal/industrial use.

[5] Colorado Springs, another NWRA member, could potentially face difficulties in managing its water supplies even "within" the Arkansas River basin, as certain tributaries from which water is diverted contain natural fluoride levels in excess of anticipated water quality standards for the segments into which discharges of the water would occur.



system demand. Other examples of transbasin diversions include the Provo River Project in Utah, which imports over 100,000 a/f per year for use in the Salt Lake City metropolitan area, the Westlands Water District in California where over two-thirds of the water used to irrigate 570,000 acres comes from transbasin deliveries, the Colorado River Aqueduct operated by the Metropolitan Water District of Southern California which can draw in excess of 1 million acre-feet in a given year,[6] and New Mexico's San Juan Chama Project, which diverts from the San Juan River Basin to the Rio Grande River Basin, supplying water to Santa Fe, Albuquerque, and various Indian tribes.

To the extent these systems convey natural waters from one distinct body of moving water into another where such water would not otherwise have flowed, under the *Miccosukee* opinion a "regulated" discharge of pollutants would be found to exist and each of the owners/operators of such facilities would find it necessary to either significantly modify their operations, build and operate expensive water treatment systems, or curtail their operations altogether. This would be the case even though they did nothing to "add" pollutants to the diverted waters and despite the fact that many of these essential diversion and transport facilities existed well before the passage of the federal Clean Water Act. *See, e.g.,* California's All

[6] California's All American Canal is the largest existing interbasin transfer (over 3.5 million a/f ("ma/f"), while California is also the home of the Friant-Kern Canal (over 1.5 ma/f) and the Francis Carr Tunnel (over 1.8 ma/f), both of which are a part of the Bureau of Reclamation's Central Valley Project.

American Canal diversion from the Colorado River (1942); the Los Angeles Aqueduct (1913); the Dolores Project of Colorado (late 1880's); and the St. Mary's River diversions into the Milk River in Montana (1911).

Finally, it must be noted that a significant number of transbasin water diversions, including many of those noted above, occur on interstate stream systems, the waters of which have been allocated between the states by interstate compact or Supreme Court decree.[7] Treating mere water transfers as regulated activities under the Clean Water Act could hold significant future implications for such "interstate" allocation schemes. For example, existing compact entitlements may not be fully utilized, as transbasin diversions to areas of highest demand would be either unavailable or cost prohibitive.[8] In addition, "downstream" states could raise water quality concerns in an effort to either have waters left in the basin of origin by "upstream" states, thereby reaping a water delivery windfall, or use the point source permitting process as leverage to ensure additional downstream deliveries. Such potential confrontations, with tremendous public policy implications, need to be avoided at all costs.

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[7] *See*, for example, Upper Colorado River Compact, 63 Stat. 31 (1949); Republican River Compact, 57 Stat. 86 (1943); Rio Grande River Compact, 53 Stat. 785 (1939); South Platte River Compact, 44 Stat. 195 (1926); and Colorado River Compact, 42 Stat. 171 (1921). *See also*, *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

[8] In Colorado, for example, while the vast majority of the population resides on the Eastern Slope of the Rocky Mountains, most of the available water supply is to be found on the Western Slope.



## SUMMARY OF ARGUMENT

The ability to freely divert, transport, store and use water in accordance with state law and water allocations made thereunder is vital to the social and economic well-being of the West. This includes the ability to move water, utilizing pipelines, canals, ditches and natural stream systems from one river basin or sub-basin to another, so as to meet municipal, agricultural and industrial water demands. Both Congress and this Court have historically deferred to the states in matters of water use, *California Oregon Power Company v. Beaver Portland Cement Company*, 295 U.S. 142, 158, 162 (1935), and have assiduously avoided impinging upon state and local authority. The federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*, does not contain any "plain statement" indicating a contrary intent, *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) and, in fact, expresses Congress' continued desire to honor state and local decision-making in the management of water resources. 33 U.S.C. § 1251(g).

The Clean Water Act simply fails to support the premise that the mere movement of water in order to meet critical water needs, in the absence of the addition of any pollutants by the water purveyor, constitutes a regulated point source discharge. Any incidental water quality impacts associated with such water diversion activities are most appropriately addressed under state law. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). Given the significance of this issue to municipal, agricultural and industrial water suppliers and the existing conflict in the circuits over this question, there can be no doubt but that this Court should issue the requested writ of certiorari.

## ARGUMENT

### I. The Eleventh Circuit Decision Cannot be Reconciled with Opposing Opinions in the D.C. Circuit, the Fourth Circuit and the Sixth Circuit.

As noted by Petitioner, the Eleventh Circuit decision is inconsistent with prior rulings by the Court of Appeals in the D.C. Circuit, the Fourth Circuit and the Sixth Circuit. *See, NWF v. Gorsuch, supra*; *United States v. Law*, 979 F.2d 977 (4th Cir. 1992); *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976); *National Wildlife Federation v. Consumer's Power*, 862 F.2d 580 (6th Cir. 1988). *See also, Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) (a regulated point source can be found where *an artificial mechanism* first introduces a pollutant). It is critical for the future of state and local water planning that this dispute over NPDES permit requirements be expeditiously resolved. As it now stands, water suppliers, including major Western municipalities and irrigators who depend on transbasin diversions, lack the necessary certainty relative to both the continued availability of their existing water supplies and the cost of delivering those supplies that can remain in their water portfolios if point source discharge permits were to be required.

EPA has conceded that pollution associated with dams and diversions "may not be amenable to the nationally uniform controls contemplated by § 402 because pollution problems are highly site-specific. . . . " *Gorsuch*, 693 F.2d at 177, fn.62. Having noted that "Congress did not want to interfere any more than necessary with state water management, of which dams are an important component," the *Gorsuch* court correctly observed that "[h]ad it considered the matter, Congress might well have decided



that dam-caused pollution was a problem best addressed through state programs." *Id.* at 178. In other words, "if confronted with the issue, [Congress might] have decided to leave the control of dams insofar as they affect water *quality* to the states. Such a policy would reduce federal/state friction and would permit states to develop integrated water management plans that address both quality and quantity." *Id.* at 179.

According to the D.C. Circuit, local control over the use of water resources represents sound public policy.

> Moreover, dams are a major component of state water management, providing irrigation, drinking water, flood protection, etc. In light of these complexities, which the NPDES program was not designed to handle, it may well be that state areawide water quality plans are the better regulatory tool.

*Id.* at 182. *California Oregon Power Company v. Beaver Portland Cement Company*, 295 U.S. 142, 158, 162, 165 (1935) ("The public interest in such state control in the arid land states is definite and substantial.") *Amici* agree. "State and local" regulatory tools are the most technically sound and legally appropriate control mechanisms for addressing water quality impacts associated with water diversion activities. Section 208 areawide management plans, Section 319 nonpoint source control programs, and Section 303(e) state continuing planning processes, when combined with unique state statutory and regulatory requirements, represent the Congressionally intended mechanism for the integration of water quality and quantity.

Unfortunately, the Eleventh and Second Circuits[9] have ignored the insightful legal reasoning and public policy determinations of their judicial brethren. This Court must now resolve the controversy.

## II. The Eleventh Circuit Opinion is Contrary to the Federal/State Balance Governing the Use of Water.

It is a time-honored legal maxim that rights to the use of water are to be determined according to the law of the states. *California Oregon Power Company*, *supra* at 158, 162.[10] As noted in *California v. United States*, 438 U.S. 645, 653 (1978):

> The history of the relationship between the Federal Government and the States in the Reclamation of the arid lands of the Western States is both long and involved, but through it runs the constant thread of purposeful and continued deference to state water law by Congress.

The above sentiment is reflected in Section 101(g) of the federal Clean Water Act, 33 U.S.C. § 1251(g). This section explicitly provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within

[9] *See, Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.2d 481 (2nd Cir. 2001).

[10] In the West, some form of the "prior appropriation" system is the predominant method of water allocation. Corbridge and Rice, Vranesh's Colorado Water Law, § 1.2 (1999).



> its jurisdiction shall not be superceded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supercede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

*Id.* This deference to state law in matters implicating water use is subsequently reiterated in Section 510 of the Act.

> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters (including boundary waters) of such states.

33 U.S.C. § 1370.

Federal regulation of the simple "movement" of water, as would be mandated under the Eleventh Circuit opinion, would be in direct contravention of this well established balance between state and federal interests. It would impair state water allocations and upset those settled expectations in water management which have led to the water infrastructure investments which now literally sustain the economies of the West.[11]

[11] By way of further explication, if water transfers constituted the addition of pollutants, such water movements would be subject to the total maximum daily load (TMDL) provisions of Section 303(d), 33 U.S.C. § 1313(d) of the Act and the federal antidegradation regulations,

(Continued on following page)

## III. There Exists no Clear Congressional Statement of Intent Endorsing Such Interference with State Laws.

Requiring NPDES permits for mere water collection and delivery activities would intrude upon matters which fall, as discussed above, within the historic power of the states. The management of land and water is predominantly a state prerogative. *See*, *California Oregon Power Co.*, *supra*; *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926). Under the Eleventh Circuit opinion, this unwarranted intrusion on state sovereignty would occur in the absence of any clear directive from Congress that it intended this type of federal interference with the ability of state and local governments to control and manage their water resources.[12] Without such a "plain statement," the Eleventh Circuit opinion cannot stand. *See*, *Gregory v. Ashcroft*, *supra*; *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). As this Court most recently reiterated in *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 173 (2001), where a statutory interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly convey its intent. That clear message as it relates to the transport of water supplies cannot be found in the Clean Water Act.

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40 C.F.R. § 131.12. In many cases, it is conceivable that the only way to curtail so-called improper pollutant loadings would be to reduce the amount of flows.

[12] It cannot be forgotten that the owners and operators of the water systems are not adding pollutants to any waters prior to the water transport – they are simply moving the natural waters from one waterbody to another.



Furthermore, as underscored by the devastating drought of the past summer in the Western United States, along with the accompanying fires, there exists a need to maximize the use of scarce water resources. "Maximum utilization" is enhanced by innovative state programs,[13] such as water banking, the operation of water exchanges, dry year transfer of water from agricultural to urban use, and water reuse projects. Each of these undertakings employs what would otherwise be underutilized or even wasted water and turns it into a valuable asset available to meet agricultural, municipal and industrial water demands. However, in many Western states, such water supply innovations are available only as a direct consequence of the ability to both freely transport water to an area of need and to reuse to extinction waters which are not native to a given basin. Requiring a NPDES permit and accompanying controls on each transbasin diversion would stifle these necessary water management initiatives,[14] as Clean Water Act permit requirements would stand in the way of simply moving the water from one basin or sub-basin to another. Certainly such an impingement upon state and local water supply options could not

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[13] See *Fellhauer v. People*, 167 Colo. 320, 336, 447 P.2d 986, 994 (1968).

[14] It must be noted that, at least in the opinion of the Ninth Circuit, "[t]he Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of pollutants from a point source without a permit." *Committee to Save Mokelumne River v. East Bay Utilities*, 13 F.3d 305, 309 (9th Cir. 1993). Hence, the actual chemical make up of the water delivered from the basin of origin may be irrelevant, and its transfer may be prohibited or limited simply due to the presence of naturally occurring constituents.

have been within the contemplation of Congress when it enacted the Section 402 point source permit requirements, 33 U.S.C. § 1342.

## CONCLUSION

There are very few issues that are more critical to municipalities, conservancy and conservation districts, canal and ditch companies, and individual farmers and ranchers in the West then their continued ability to utilize scarce water resources when and where they are needed. This necessarily involves the collection, storage and conveyance of that water through pipelines, tunnels, canals and natural waterbodies. Such water management activities have always been, and must remain, a state and local prerogative.

The Eleventh Circuit's conclusion that the mere movement of natural waters from one stream or river to another constitutes a regulated "addition" of pollutants is clearly at odds with decisions reached by other circuits. Furthermore, not only is there no plain legislative statement in support of this impingement upon the traditional authority of local entities, in addition there can be no doubt that the decision would significantly interfere with the federal/state balance relative to the use of water. *Amici* therefore urge this Court to (i) grant their Motion for Leave to File this *Amicus* Brief, (ii) grant the Petition for



Certiorari, and (iii) reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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No. 02-626

In the
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari. Written consent for amicus participation in this case was granted by counsel of record for Petitioner and Respondent Friends of the Everglades. Consent was withheld by Respondent Miccosukee Tribe of Indians.[1]

## INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated as amicus curiae in numerous cases before this Court concerning the statutory interpretation and constitutional application of a variety of federal environmental statutes including the Clean Water Act. For example, PLF participated as amicus curiae in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

167 (2000); *Hanousek v. United States*, 528 U.S. 1102 (2000); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and is appearing as amicus curiae before the Court this term in several cases, including *Borden Ranch Partnership v. United States Army Corps of Engineers, cert. granted*, 122 S. Ct. 2355 (2002).

PLF seeks to augment the arguments of Petitioner by providing additional perspective and background on the regulatory scheme that is the subject of this petition. For nearly 30 years, PLF attorneys have represented numerous parties from the agricultural, home building, forestry, and related industries who must comply with the strictures of the point source and nonpoint source permitting provisions of the Clean Water Act. It is imperative that the interpretation and enforcement of these provisions be uniformly applied across the country, but as this case points out, that is not happening. In fact, this case raises the possibility that hundreds of thousands of water diversion facilities, never before thought to need point source discharge permits, will not be able to operate without building and operating very expensive water treatment systems.

PLF believes its public policy perspective and litigation experience dealing with clean water issues will provide a valuable viewpoint on the issues presented in this case and will aid this Court in evaluating the merits of the Petition.



For all the foregoing reasons, Pacific Legal Foundation's motion to file a brief amicus curiae should be granted.

DATED: November, 2002.

Respectfully submitted,

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## QUESTIONS PRESENTED

1. Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

2. Whether the court below should have deferred to the consistent and long-held federal and state agency position that the SFWMD's pumping does not constitute an "addition" that requires a National Pollutant Discharge Elimination System permit.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

INTRODUCTION ..... 1

OVERVIEW OF THE CLEAN WATER ACT'S STRUCTURE TO CLEAN UP THE NATION'S WATERS ..... 1

STATEMENT OF FACTS ..... 3

SUMMARY OF ARGUMENT ..... 6

ARGUMENT ..... 7

I. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A SIGNIFICANT CONFLICT AMONG THE CIRCUITS ..... 7

A. The Eleventh Circuit's Decision Has Resulted in Unsettling Confusion ..... 7

B. Other Circuits Have Declined to Require NPDES Permits for Similarly Situated Water Diversion Facilities ..... 10

1. District of Columbia ..... 10

2. Sixth Circuit ..... 10

3. Fourth Circuit ..... 11

4. Seventh Circuit ..... 12

C. The Ninth Circuit Has Required NPDES Permits for Similarly Situated Water Diversion Facilities .. 12




## TABLE OF CONTENTS—Continued


Page

II. THE ELEVENTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION—IS CWA'S NPDES PROGRAM INTENDED TO APPLY TO FLOOD CONTROL AND WATER DIVERSION FACILITIES AND THEREBY MARGINALIZE CWA'S NONPOINT SOURCE MANAGEMENT SCHEME? ..... 14

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

Page

### Cases

*Appalachian Power Company v. Train*,
545 F.2d 1351 (4th Cir. 1976) ..... 11-12

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... 8-9

*Committee To Save Mokelumne River v. East Bay Municipal Utility District*,
13 F.3d 305 (9th Cir. 1993) ..... 12-13

*Dubois v. United States Department of Agriculture*,
102 F.3d 1273 (1st Cir. 1996) ..... 8-9

*EPA v. California*, 426 U.S. 200 (1976) ..... 14

*ETSI Pipeline Project v. Missouri*,
484 U.S. 495 (1988) ..... 16

*Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*,
300 F.3d 1294 (11th Cir. 2002) ..... 9

*Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000) ..... 12

*Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*,
280 F.3d 1364 (11th Cir. 2002) ..... 4-5, 7-9

*National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) ..... 10-11, 13

*National Wildlife Federation v. Gorsuch*,
693 F.2d 156 (D.C. Cir. 1982) ..... 10-11, 13

*Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) ..... 3



## TABLE OF AUTHORITIES—Continued

Page

*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,
531 U.S. 159 (2001) ..... 16

*United States v. Earth Sciences*,
599 F.2d 368 (10th Cir. 1979) ..... 1

### Statutes

33 U.S.C. § 1251(a) ..... 1

§ 1251(b) ..... 16

§ 1288 ..... 2, 14-15

§ 1311 ..... 2, 14

§ 1311(a) ..... 10

§ 1311(b) ..... 14

§ 1311(c) ..... 14

§ 1313(d) ..... 2, 15

§ 1313(d)(3) ..... 3

§ 1313(e) ..... 3

§ 1314(f) ..... 15

§ 1318(a) ..... 2

§ 1324(f)(2)(F) ..... 5

§ 1329 ..... 2, 14-15

§ 1329(a) ..... 2

§ 1329(b) ..... 2

§ 1329(h) ..... 2

§ 1333(d) ..... 14

**TABLE OF AUTHORITIES—Continued**


Page

§ 1342 ..... 2, 5

§ 1362(12) ..... 10

§ 1362(12)(A) ..... 7

§ 1362(14) ..... 1, 9

§ 1365 ..... 2

Fla. Stat. § 373.069 ..... 3

§ 373.1501 ..... 4

§ 373.4595 ..... 3

§ 403.0885 ..... 2

**Regulations**

40 C.F.R. §§ 122-124 (2002) ..... 2

§ 122.41(j) (2002) ..... 2

§ 130.2(e) (2000) ..... 3

63 Fed. Reg. 14,109 (Mar. 24, 1998) ..... 16

**Miscellaneous**

Bartfeld, Esther, *Point—Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 Envtl L. 43 (1993) ..... 1

EPA NPDES Permit Writers Manual, Chapter 5, Technology-Based Effluent Limits ..... 6

http://crunch.tec.army.mil/nid/webpages/nidintroduction.html (last visited Nov. 13, 2002) ..... 14

http://www.sfwmd.gov/histo/2_history.html (last visited Nov. 13, 2002) ..... 4




**TABLE OF AUTHORITIES—Continued**


Page

Purdum, Elizabeth D., *Florida Waters: A Water Resources Manual from Florida's Water Management Districts* (2002) ..... 3

Vergura, Jim & Jones, Ron, *The TMDL Program: Land Use and Other Implications*, 6 Drake J. Agric. L. 317 (2001) ..... 2-3, 15-16

## INTRODUCTION

This case raises an important question that will affect municipalities, flood control agencies, water districts, dam operators, and all other entities that are involved in managing water flows for the benefit and protection of society. Must these entities obtain restrictive federal Clean Water Act "point source" discharge permits in order to do their jobs? Because of the Eleventh Circuit's decision in this case that they must, the ability of these entities to provide such a critical public service is in jeopardy.

## OVERVIEW OF THE CLEAN WATER ACT'S STRUCTURE TO CLEAN UP THE NATION'S WATERS

The Clean Water Act's primary goal is to "restore and maintain the chemical, physical, and biological integrity of the Nations's waters." 33 U.S.C. § 1251(a). The Act seeks to eliminate pollution and the discharge of pollutants into navigable waters. In designing the program to accomplish this goal, the Act recognizes two different sources of pollution, point sources and nonpoint sources. The Clean Water Act defines a point source as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Exempted are agricultural stormwater discharges and irrigated agricultural return flows. *Id.* Nonpoint sources are not defined by the Act, but are considered to be all other sources of pollution that are not regulated under the point source definition. A nonpoint source refers to "disparate runoff caused primarily by rainfall around activities that employ or cause pollutants." *United States v. Earth Sciences*, 599 F.2d 368, 373 (10th Cir. 1979). *See also* Bartfeld, Esther, *Point—Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 Envtl L. 43, 45 n.6 (1993).

Under the Act, a nonexempt, point source discharger of a pollutant into the nation's waters is required to obtain a

National Pollutant Discharge Elimination System permit in order to legally operate. 33 U.S.C. § 1311. The permit establishes effluent limitations and stipulates specific terms and conditions of discharge that are based on available technology and water quality standards. 33 U.S.C. § 1342, 40 C.F.R. §§ 122-124 (2002). Dischargers are required to publicly disclose the nature and volume of their discharges in reports which provide the basis for enforcement against noncomplying dischargers. 33 U.S.C. § 1318(a), 40 C.F.R. § 122.41(j). *See also* 33 U.S.C. § 1365 (authorizing citizen suits to enforce CWA violations). Many states administer the NPDES permitting program with federal EPA oversight, as does Florida. Fla. Stat. § 403.0885.

Nonpoint source pollution requires a different set of solutions since it is not readily attributable to easily identifiable outlets. In an example of cooperative federalism, Congress gave states the authority and responsibility to manage nonpoint source pollution. States are to develop areawide waste treatment management plans, 33 U.S.C. § 1288, that are to direct changes in local land use practices and other local behaviors that cause nonpoint source pollution. Section 319 of the Act, 33 U.S.C. § 1329, encourages states to identify best management practices (BMPs) to reduce pollutant loading and employ them in establishing their management programs for water bodies to achieve water quality standards developed by the states. 33 U.S.C. § 1329(a), (b). Section 319 also supports development of management plans through a federal grant program to the states. 33 U.S.C. § 1329(h).

Nonpoint source pollution is also addressed in section 303(d) of the Act. 33 U.S.C. § 1313(d).

> In short, section 303(d) . . . requires states to 1) identify waters that are and will remain polluted after the application of technology standards (i.e., the NPDES program), 2) prioritize the waters, taking into account the severity of their pollution, and 3) establish total maximum daily loads for the waters at levels necessary to meet applicable water quality standards.



Vergura, Jim & Jones, Ron, *The TMDL Program: Land Use and Other Implications*, 6 Drake J. Agric. L. 317, 320 (2001). The term "load" refers to pollution from both point and nonpoint sources. 40 C.F.R. § 130.2(e) (2000). The state is then to incorporate its list of impaired water bodies and TMDLs into its continuing clean water planning process.[1] 33 U.S.C. § 1313(d)(3), (e). Through this process, the states are an integral partner with the federal regulators in a mutual effort to provide clean waters in our nation.

## STATEMENT OF FACTS

Florida is a state that has a complex hydrological landscape.[2] The state has vast areas that are or have been naturally inundated. The only way these areas have been made functional and habitable has been to empower governmental agencies to control the movement and placement of water. The Petitioner in this case, the South Florida Water Management District (District or SFWMD), is the largest of five regional water management districts in the state charged with providing vital flood protection. Fla. Stat. § 373.069. The District "is responsible for the Lake Okeechobee watershed, an immense, integrated and unique system of hydrologically connected lakes, rivers, bays and surface waters . . . . Fla. Stat. § 373.4595. Within this watershed lie populous municipalities, vast

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[1] The Ninth Circuit decision, *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002), ruled recently that the 303(d) program applies to all water bodies that have not met water quality standards, even those polluted only by nonpoint sources. *Id.* at 1140-41.

[2] *See* Purdum, Elizabeth D., *Florida Waters: A Water Resources Manual from Florida's Water Management Districts* (2002).

agricultural communities, and precious resources, including Florida's Everglades." Petition for Writ of Certiorari (Pet.) at 8-9.

The Lake Okeechobee watershed is a 16 county area from Orlando to Key West and is managed by a United States Army Corps of Engineers' project known as the Central & Southern Florida Flood Control Project (C&SFFCP). Fla. Stat. § 373.1501. The Project consists of a system of levees, canals, water impoundment areas, and flow diversion facilities for controlling the movement, flow, and circulation of water. The Project is operated today by the District under Corps of Engineers' oversight and guidelines. *Id.*, Pet. at 9.[3]

This case arose as a result of the District's federally overseen and approved operation of the Project. As part of the Project, the District must manage the flow of water across the watershed to keep some areas from flooding and ensure other areas receive supplies of water.

The areas now called the C-11 Basin and Water Conservation Area - 3A (WCA-3A) were historically part of the Everglades. In the early 1900's, the Army Corps of Engineers constructed the C-11 Canal to facilitate the draining of the 48,000-acre, western portion of Broward County which is part of the C-11 Basin. Later, the Corps constructed the L-33 and L-37 levees to create the separate 491,000-acre Water Conservation Area-3A to the west of the C-11 Basin and also completed construction of the S-9 pump station. *See Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364, 1366 (11th Cir. 2002).

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[3] This Project is huge. It involves 391 water diversion structures consisting of pumping stations incorporated with 1,800 miles of canals and levees. Pet. at 4; http://www.sfwmd.gov/histo/2_history.html at 1 (last visited Nov. 13, 2002). The Project controls water flow over 17,930-square miles of land in Florida. *Id.*



The C-11 Canal runs through the C-11 West Basin. It collects water runoff from this area and seepage coming through the levees from WCA-3A. The S-9 station then pumps this water through three pipes from the C-11 Canal through the L-33 and L-37 levees into WCA-3A and prevents the heavily populated western portion of Broward County from flooding. Without this system, it would flood within days. *Id.*

The movement of water collected by the C-11 Canal to WCA-3A is the basis for the lawsuit now before this Court. The water collected on the east side of L-33 and L-37, the C-11 Basin side, has a higher phosphorous content than the west side, the WCA-3A side. Apparently unhappy with the "eight billion-dollar joint federal and state effort to re-plumb the C&SFFCP to restore the everglades while accommodating the region's competing urban and agricultural interests," Pet. at 9, the Miccosukee Tribe of Indians and the Friends of the Everglades, Inc., challenged the water diversion activities of S-9 as illegally operating without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342. *See Miccosukee*, 280 F.3d at 1367. The district court and the Eleventh Circuit Court of Appeals agreed with Plaintiffs, and in so doing have created great confusion and unsettling conflict among the circuits as to when an NPDES permit is required. They have also set the stage for federalizing the management of local surface water flows and the local land uses that accompany such management in blatant contradiction of the express terms of the CWA. *See* 33 U.S.C. § 1324(f)(2)(F).

State and regional water management agencies, local water districts, municipalities, dam operators, agricultural operations, and any other entity concerned with the necessary movement of water for flood control and water management purposes are faced with having to obtain an economically costly, highly

restrictive, federal permit to operate.[4] This was never intended by the CWA and, if not addressed by this Court, effective water diversion and flood protection activities of Florida's five regional water districts will be subjected to oppressive NPDES permitting rules and restrictions.

## SUMMARY OF ARGUMENT

The NPDES program of the Clean Water Act forbids the discharge of any pollutant from a point source into the nation's waters without a permit. The SFWMD employs numerous pumping plants and a thousand-mile system of ditches and levees to control water flow across the landscape. These dam-like water diversion facilities move water from area to area to prevent flooding and provide water for consumptive purposes. They themselves add no pollutants to the water yet the Eleventh Circuit decision below has created a schism between the circuits ruling that if water on one side of a pumping plant contains a pollutant and the receiving side does not, the pumping plant may not divert the water without an NPDES permit. Other circuits have ruled when a dam or dam-like facility merely moves water from one side of the dam to the other, without the facility adding a pollutant, it does not need an NPDES permit. If not addressed and overturned, this decision could cause serious operational and economic problems for hundreds of thousands of dam, and dam-like, facilities in this country that prior to this decision did not require such permits.

Additionally, the Clean Water Act is clear that water diversion activities like those in this case are to be regulated as part of the nonpoint source pollution control program of the Act. The Clean Water Act left to the states their traditional responsibilities to control land use and manage water supply.

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[4] *See* EPA NPDES Permit Writers Manual, Chapter 5, Technology-Based Effluent Limits for the complexity of considerations that go into developing technology based effluent limitations for both nonmunicipal and municipal discharges.



This decision circumvents Congress's express will and abrogates to EPA that role. For these very important reasons, this Court should grant certiorari.

## ARGUMENT

## I

## THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A SIGNIFICANT CONFLICT AMONG THE CIRCUITS

### A. The Eleventh Circuit's Decision Has Resulted in Unsettling Confusion

Confronted with the question of whether the District's operation of the S-9 water diversion system required an NPDES permit, the Eleventh Circuit reached the decision that the District must obtain an NPDES permit to continue its flood protection activities with regard to western Broward County and the heavily populated C-11 West Basin. It reasoned that the District's diversion of water from one side of flood control levees L-33 and L-37 to the other constituted the discharge of a pollutant from a point source into navigable waters needing a permit. *Miccosukee*, 280 F.3d at 1367.

The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The court found that the primary dispute in the case was not whether the S-9 station involved a point source (the pipes through the levees), or whether the water that drained into WCA-3A contained a pollutant (the phosphorous), but whether the movement of the phosphorous rich water from one side of a levee (a form of dam) to the other into water that did not have the increased level of phosphorous, constituted an "addition" of a pollutant to navigable waters from a point source. The court found that this movement did constitute an "addition" requiring a permit.

The Eleventh Circuit's decision in this case applied a rarely used paradigm for determining whether a water diversion facility like a reservoir/dam system, or a levee/pumping system like S-9 and L-33/L-37, requires an NPDES permit. Instead of determining whether the system itself adds a pollutant and whether the relevant water bodies essentially make up one larger water body, the court used another model. Under it, the court found a point source must have a permit if the receiving body of water would not have received the pollutant had the point source not been in operation. In other words, "the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." 280 F.3d at 1368. In using this test, the court declined to accept the positions of the Fourth, Sixth, Seventh, and D.C. Circuits as to when an addition of a pollutant occurs in the operation of water diversion and management facilities and instead adopted the completely contrary "but for" analysis only appropriate for other circumstances.

The court instead relied on distinguishable decisions stating: "Our conclusion is consistent with the views of the First and Second Circuits." In *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), the First Circuit concluded that the piping of water from the polluted East Branch River for commercial use and its proposed release into the upstream Loon Lake would constitute an addition of pollutants from a point source. *Id.* at 1296-99. Then, in *Catskill Mountains*, the Second Circuit concluded that the diversion of water from a reservoir containing pollutants by tunnel into a creek for which the reservoir was not naturally a source would constitute an addition of pollutants from a point source. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001). "Both courts emphasized that the two bodies of water were separate and that pollutants would not enter the second body except for the point source." *Miccosukee*, 280 F.3d at 1369 n.7.



Unfortunately, the court did not recognize the facts of *Dubois* and *Catskill* do not fit *Miccosukee* and other dam or levee water management cases where the water bodies are contiguous. This lack of recognition has not only created circuit conflicts as described below, but has even caused confusion within the Eleventh Circuit itself.

The court recently faced again the question of whether a water management system required an NPDES permit. In *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002), irrigation return flows were discharged into Lake Okeechobee. Although the "CWA specifically exempts 'agricultural stormwater discharges and return flows from irrigation agriculture' from the definition of a point source," *id.* at 1297, 33 U.S.C. § 1362(14), the court had to decide whether nonagricultural discharges from adjoining property that flowed onto Closter Farms and discharged with irrigation runoff into the lake negated the NPDES permit exemption. Initially the district court found in a pre-*Miccosukee* decision that any pollutants that originated off the farm did not need a permit because they emanated from other discharges that are "either the subject of existing NPDES permits or are exempted from NPDES permitting [e.g., nonpoint source discharges such as runoff from adjoining county roads.]" *Closter Farms*, 300 F.3d at 1298. However, confronted with the Eleventh Circuit's decision in *Miccosukee*, which expressly declined to follow the widespread precedent that an NPDES permit is not required unless the point source system itself adds the pollutant to the water, the *Closter Farms* panel of the Eleventh Circuit instead avoided the controversy and made the unconvincing finding of insufficient evidence in the record to support a conclusion that nonagricultural runoff was being discharged. *Id.* Clearly this Eleventh Circuit panel was unsettled by *Miccosukee*, and found itself creating factual distinctions to avoid its implications.

Such confusion and internal discord needs to be settled by this Court.

**B. Other Circuits Have Declined to Require NPDES Permits for Similarly Situated Water Diversion Facilities**

**1. District of Columbia**

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the circuit court considered whether the operations of a dam must obtain NPDES permits. The court addressed the question of whether "certain dam-induced water quality changes," *id.* at 161, constitute the "discharge of a pollutant." *Id.* Specifically, by damming streams reservoirs are created upstream for the purposes, among others, of preventing flooding, storing drinking and irrigation water, providing a source of electric power, and moderating water flow. Damming can also cause the levels of pollutants such as sediment and dissolved minerals and nutrients to increase in the reservoir's water which, when released downstream through the piping system of the dam's structure, can change the quality of the water below the dam. Faced with the question of whether such an operational activity of dams involves "the discharge of any pollutant," 33 U.S.C. § 1311(a), because it causes the "*addition* of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12) (emphasis added), the court accepted EPA's reasoning that "the . . . character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)." 693 F.2d at 175. Of course, as with the instant case, water above the dam, and that below the dam, all comes from one contiguous, connected water body.

**2. Sixth Circuit**

In *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988), the circuit court



considered whether an NPDES permit was required for the operation of a hydroelectric facility that pumps water out of Lake Michigan up hill to a man-made reservoir that later releases its water downhill through huge penstocks and electricity generating turbines and then back into the Lake. In the process, the pumping of lake water to the reservoir also pulled up fish with it. When the water and fish were later dropped back through the penstocks and this time through the turbines, not only the water, but "entrained fish (live and dead fish, and fish remains)," *id.* at 581, were discharged back into Lake Michigan. Accepting the fact that the fish remains constituted a pollutant, the court was faced with the question of whether their discharge constituted the "addition of a pollutant" requiring an NPDES permit. The court followed the *Gorsuch* precedent finding that a hydroelectric power dam could indeed add pollutants from the outside to navigable waters "by tangential processes in generating electricity," *id.* at 586, thus requiring a permit, but "the fish, both dead and alive, always remain within the waters of the United States, and hence cannot be added." *Id.* Thus, "those pollutants already in the water (not added by the dam's operation) moved and transformed by the essential operation of the hydroelectric power dam," *id.*, do not require an NPDES permit. The court once again found no essential "addition of a pollutant" where the activity involved the diversion of water between two contiguous water bodies, indeed two bodies that were originally one, and there was no introduction of a pollutant in the operation of the water diversion facilities. These operational facts are parallel to the instant case.

**3. Fourth Circuit**

In *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976), the circuit court dealt with a challenge to regulations establishing limitations on the discharge of heat from steam electric generating plants into navigable waters. Industry argued the effluent limitations in the regulations

created absolute standards that applied regardless of the pollutants in a plant's intake water. *Id.* at 1377. The court agreed that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass," *id.*, and accordingly do not constitute a regulable "discharge of a pollutant." *Id.* Thus, the circuit court found that a pollutant not introduced by the operation of the point source (e.g., dam, hydroelectric facility, water diversion pump and levee complex) did not constitute the discharge of a pollutant subject to a NPDES permit.

**4. Seventh Circuit**

In *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), the circuit court declined to require a permit for downstream flow of sediment captured above an instream dam when the weathered and damaged dam was removed by the state. Although the court rejected the plaintiff's premise that removing a dam could create a point source of pollution, it nevertheless reached a similar conclusion to the circuits above in finding that if a point source discharges a pollutant into a pond, the fact that the pollutant then travels down stream from one tributary to another does not make each confluence a new point source subject to an NPDES permit. *Id.* at 938. This is analogous to the above circuits' conclusions that a facility that directs polluted water from one contiguous water body to another without itself adding a pollutant, is also not subject to NPDES permitting requirements.

**C. The Ninth Circuit Has Required NPDES Permits for Similarly Situated Water Diversion Facilities**

In *Committee To Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993), the circuit court addressed whether water with high levels of acid that drained as natural surface runoff from a mine into adjacent navigable waters could constitute an "addition of a pollutant"



requiring an NPDES permit when it was first collected in an attempt to clean it up. Owners of the mine had constructed a dam to impound the acid drainage, and keep it from discharging into the adjacent river and reservoir until purified through a system of evaporation ponds, but at times, the water "passed over the spillway . . . into the Mokelumne River." *Id.* at 308. The court found that this discharge did constitute an "addition" of a pollutant requiring an NPDES permit, but in doing so, it attempted to distinguish the case from *Gorsuch* and *Consumers Power* finding that the water diversion operation involved with the mine "does not pass pollution from one body of navigable water to another." *Id.* The court's distinction is unpersuasive, however, as the water running through the mine site originally flowed into the Hinkley Run and Mine Run Creeks which flow into the Mokelumne River. The owner of the mine created a dam and impoundment system to try to eliminate these original nonpoint source pollutants prior to entering the Mokelumne. Thus, the water passed from one side of the dam to the other from "one body of navigable water to another." Accordingly, this case clearly conflicts with the D.C., Sixth, Fourth, and Seventh Circuits. The case also conflicts with the position of the D.C., Sixth, Fourth, and Seventh Circuits that pollutants not generated by the operation of the water diversion facility, such as pollutants occurring naturally in the water or by virtue of authorized nonpoint source activities, do not constitute an *addition* of a pollutant when diverted into adjacent navigable waters.

Thus, the Eleventh Circuit's decision in this case highlights a significant conflict between the circuits as well as confusion with the Eleventh Circuit itself. This Court should grant the writ of certiorari to eliminate the conflict and clear up the confusion.

## II

## THE ELEVENTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION—IS CWA'S NPDES PROGRAM INTENDED TO APPLY TO FLOOD CONTROL AND WATER DIVERSION FACILITIES AND THEREBY MARGINALIZE CWA'S NONPOINT SOURCE MANAGEMENT SCHEME?

The CWA legislates two principal methods to clean the nation's waters. The first is to eliminate pollutants from being discharged from point sources into the waters. 33 U.S.C. § 1311. The second was to reduce pollutants from nonpoint sources of pollution by the development of areawide waste treatment plans, 33 U.S.C. §§ 1288, 1329, and the imposition of total maximum daily loads of pollutants and plans to control them in waterbodies where those pollutants exceed state imposed water quality standards. 33 U.S.C. § 1333(d).

NPDES permits are required for point source discharges, which include principally municipal and industrial wastewater outflows. The permit is designed to get toxins out of the water and generally requires the discharger to reduce discharges to the maximum extent technology will allow. 33 U.S.C. § 1311(b), (c), *see EPA v. California*, 426 U.S. 200, 204 (1976). If flood control and water flow management facilities are indeed covered by this CWA provision, as the Eleventh Circuit ruled in this case, the national costs will be astronomical. The Corps of Engineers' National Inventory of Dams indicates that approximately 77,000 dams are currently on its inventory list. http://crunch.tec.army.mil/nid/webpages/nidintroduction.html (last visited Nov. 13, 2002). If you add to that total the number of local, regional, and state water management operations that also serve to protect against flooding and provide water supplies, we are dealing with a huge number of facilities. Imposing new NPDES permitting requirements for so many facilities, never before thought to need such permits, will be a



slow, ponderous, logistically difficult, monumentally costly project.

One would expect Congress to clearly express its intent to impose such requirements on mere water diversion mechanisms, but such expression is found nowhere in the CWA. In fact, the language of the CWA requires no such thing, but instead recognizes that any pollutants associated with such water diversion facilities will be attacked through the CWA's system for controlling nonpoint source pollution. More to the point, Congress was clear in its intent that the water diverted by water management systems like SFWMD's C-11/S-9/L-33/L-37/WCA-3A is to be protected and purified through nonpoint management methods. Specifically, in 33 U.S.C. § 1314(f) Congress instructed the EPA administrator to provide guidelines and information to states for identifying

> (1) the nature and extent of *nonpoint sources* of pollutants, and (2) processes . . . from
>
> . . . .
>
> (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

(Emphasis added.)

It could not be much clearer. Pollutants flowing through such facilities as S-9 are subject to state and local controlled nonpoint source management methods of pollution control. *See* 33 U.S.C. §§ 1288, 1329, 1313(d). Yet, the Eleventh Circuit ignored this intent of Congress to make sure water management and flow diversion facilities, facilities generating no pollution on their own, are not required to be treated like an industrial or municipal polluter and obtain NPDES permits requiring expensive technology to limit effluent outflows. *See* Vergura,

*supra*, at 317 n.1, for Clean Water Action Plan, 63 Fed. Reg. 14,109 (Mar. 24, 1998).

Flood control and water delivery activities are traditionally performed by the states for the purpose of facilitating appropriate land uses. But with EPA having the power to control flood protection strategies, as well as other water supply and management strategies (e.g., irrigation flow) through its NPDES permitting authority, the state will lose its land use planning role. Such was never contemplated by the CWA. In fact, just the opposite is evident as "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .' 33 U.S.C. § 1251(b)." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (*SWANCC*). *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 503 (1988) (Congress espoused even earlier in the Flood Control Act of 1944 a policy of "recogniz[ing] the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control.").

Thus, Congress could not have intended, as the Eleventh Circuit has ruled, to impose EPA-controlled NPDES permitting requirements on the management of water for flood control and water supply purposes. Yet, the Eleventh Circuit's finding nevertheless "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. Such an alteration of the traditional role of the states to manage land use and water supply is an extremely important question of national dimension that calls for this Court's review.



## CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: November, 2002.

Respectfully submitted,

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No. 02-626 (4)

IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, and CHARLES H. BRONSON, as the FLORIDA COMMISSIONER OF AGRICULTURE IN SUPPORT OF THE PETITION

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, the Florida Fruit & Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and Charles H. Bronson, as the Florida Commissioner of Agriculture, request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Consent for *amici* participation was requested for the Florida Fruit & Vegetable Association, Florida Farm Bureau Federation, and American Farm Bureau Federation, but was denied by the Miccosukee Tribe of Indians by letter dated November 5, 2002, and denied by the Friends of the Everglades in a letter dated November 7, 2002. Requested consent for amicus participation for Commissioner Bronson was denied by the Miccosukee Tribe of Indians by letter dated November 15, 2002; no response was received from the Friends of the Everglades.

The Florida Fruit and Vegetable Association is a non-profit, agricultural trade organization headquartered in Orlando, Florida. Its mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. The Florida Fruit and Vegetable Association represents and assists its membership on a broad range of farming issues, including environmental protection, marketing, labor, food safety, and pest management. These services help Florida growers set the standard for competitively producing an abundant supply of safe, affordable fruits, vegetables and other crops. Its members produce much of the winter vegetable crop for the United States.

The American Farm Bureau Federation is a voluntary general farm association organized in 1920. It was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. American Farm Bureau Federation has member organizations in all 50 states and Puerto Rico, representing more than five million member families. The American Farm Bureau Federation has participated as *amici curiae* in many cases involving issues of importance to its members in the U.S. Supreme Court and the courts of appeal, including issues arising under the Clean Water Act.

The Florida Farm Bureau Federation is one of the constituent members of the American Farm Bureau Federation. It represents the interests of farmers and ranchers in Florida. The Florida Farm Bureau Federation is composed of 62 county farm bureaus with more than 143,400 member families. It is headquartered in Gainesville, Florida.

American farmers and ranchers represented by the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, and American Farm Bureau Federation own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food, fiber and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether.

Charles H. Bronson, the Florida Commissioner of Agriculture, supervises all matters pertaining to agriculture in the State of Florida, pursuant to Article IV, Section 4(f), of the Florida Constitution, except as otherwise provided by law. The Commissioner of Agriculture is also the head of the Florida Department of Agriculture and Consumer Services under Section 20.14(1) Florida Statutes, and is statutorily charged with the duty to "protect the agricultural and horticultural interests of the state" under Section 570.07(13), Florida Statutes. The Florida legislature has declared in Section 604.001(2) & (5), Florida Statutes that "[t]he production of agricultural commodities in this state is a large and basic industry that is important to the health and welfare of the people and to the economy of the state" [and] "that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable." Under Sections 570.074 and 570.085, Florida Statutes, the Commissioner has created and oversees an office of water coordination for the purpose of engaging in any matter "relating to water policy affecting agriculture, application of such policies, and coordination of such matters with state and federal agencies."

The Commissioner's participation in this matter flows from his constitutional and statutory duty to protect Florida agricultural food products and the interests of all Florida citizens involved in or affected by issues impacting the continued viability of agricultural operations in the state.

The three organizations and the Florida Commissioner of Agriculture are keenly aware of the changing position of the United States within the international trade world. This change is bringing opportunities, challenges, and threats to

United States growers and ranchers. The movement toward freer trade in the western hemisphere brings new and continued competitive challenges to United States agriculture, which strives to produce competitive products despite environmental laws which sometimes impair the ability to compete.

In order to keep American farm products competitive, the regulatory scheme of one environmental law, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, provides agricultural exemptions for the discharge of water used for the production of crops. 33 U.S.C. §§ 1342(l) and 1362(14). These exemptions are part of the National Pollutant Discharge Elimination System ("NPDES") component of the CWA, a permit program to limit the discharge of pollutants into the nation's waters. *See* 33 U.S.C. § 1342 ("Section 402"). The Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, Florida Commissioner of Agriculture seek to support the petition for a writ of certiorari to prevent a fundamental change in the implementation of the agricultural exemptions, which the Eleventh Circuit's expansive decision appears to authorize.

The NPDES program limits the flow of pollutants into the nation's waters by regulating discharges from "point sources." The definition of "point source" for that program specifically excludes agricultural discharges, stating: "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). The NPDES statute prohibits any permit requirements for these agricultural discharges, stating: "The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly require any State to require such a permit." 33 U.S.C. § 1342(l).

The rules implementing the agricultural exemptions further explain what is and is not a "point source" under the statutory definition of the NPDES program. Specifically, 40 C.F.R. § 122.3(e) provides, in pertinent part, that discharges from the "introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands" do not require NPDES permits.

While the NPDES permit program has been controversial, complex and contentious since its inception, historical implementation of the agricultural exemptions has not generated nearly as much litigation. That is because the United States Environmental Protection Agency ("EPA") and state deferral agencies implementing the NPDES program lack regulatory control over discharges from the production of crops.

Farmer and rancher members in the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, and American Farm Bureau Federation, and the Florida Commissioner of Agriculture have a direct interest in the outcome of this case. That interest is to ensure the agricultural exemptions in the NPDES program continue to be as effective as in the past. The last thing farmers and ranchers need, at what is already a time of economic crisis in the industry, is an erosion of these exemptions and the related increase in their costs of doing business. Any diminution of the full impact of the agricultural exemptions will prevent farmers and ranchers from producing crops that are competitively priced in the world market.

For the reasons stated above, the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and the Florida Commissioner of Agriculture respectfully request that the Court grant their motion for leave to file this brief *amici curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF *AMICI CURIAE* | 2 |
| ARGUMENTS | 5 |
| I. THE ELEVENTH CIRCUIT'S DECISION WOULD HAVE THE EFFECT OF OVERRIDING THE AGRICULTURAL EXEMPTIONS OF THE NPDES PROGRAM | 5 |
| A. Agricultural Exemptions from the NPDES Program | 5 |
| B. Legislative History of the Agricultural Exemptions | 6 |
| C. Effect of Eleventh Circuit's Decision on the Agricultural Exemptions | 9 |
| II. THE ELEVENTH CIRCUIT ERRED IN FINDING THE MOVEMENT OF WATER IN THE LAKE OKEECHOBEE WATERSHED IS SUBJECT TO THE NPDES PROGRAM | 10 |
| III. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE A CONFLICT AMONG CIRCUITS OVER THE APPLICABILITY OF THE NPDES PROGRAM TO THE MOVEMENT OF WATER CONTAINING PRE-EXISTING POLLUTANTS | 11 |
| CONCLUSION | 14 |

## TABLE OF AUTHORITIES


CASES — Page

*Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) ..... 11
*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... 12
*Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1272 (1st Cir. 1996) ..... 13
*Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002) ..... 8
*Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir. 1996) ..... 5
*Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *affirmed sub nom. Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) ..... 7
*National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) ..... 12
*National Wildlife Federation v. Gorsuch*, 693 So.2d 156 (D.C. Cir. 1982) ..... 11, 12

CONSTITUTIONAL AND STATUTORY PROVISIONS

Art. IV, § 4(f), Fla. Const ..... 2
33 U.S.C. § 1251 ..... 3, 6
33 U.S.C. § 1311(a) ..... 5
33 U.S.C. § 1314(f)(2)(F) ..... 12
33 U.S.C. § 1342(l) ..... 3-6
33 U.S.C. § 1342(a) ..... 5
33 U.S.C. § 1342(c) ..... 5
33 U.S.C. § 1342(p) ..... 8
33 U.S.C. § 1362(12) ..... 13




## TABLE OF AUTHORITIES—Continued


Page

33 U.S.C. § 1362(14) ..... 3, 5
40 C.F.R. §122.3(e) ..... 6
Pub. L. 92-500, § 208 (1972); 86 Stat. 816, 839-841, *codified as amended*, 33 U.S.C. § 1288 (2001); S. Rep. No. 414, 92nd Cong., 1st Sess. 139, *reprinted in* 1972 U.S.C.C.A.N. 3668 ..... 7
Pub. L. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (1972), *codified as amended*, 33 U.S.C. § 1288(b)(2)(F); S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. at 3759-3760 ..... 7
Pub. L. 92-500, § 402; 86 Stat. 816, 883 (1972), *modified as amended* 33 U.S.C. § 1342 (2001) ..... 7
Pub. L. 95-217, § 33(b); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1362(14) (2001) ..... 7
Pub. L. 95-217, § 33(c); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1342(l) (2001) ..... 7
Pub. L. No. 100-4, § 503; 101 Stat. 7, 75 (1987) ... 8

FLORIDA STATUTES

§ 20.14(1), Fla. Stat ..... 2
§ 373.1501, Fla. Stat. (2002) ..... 10
§ 373.503, Fla. Stat. (2002) ..... 4, 9
§ 373.4592(9)(k) & (l), Fla. Stat. (2002) ..... 10
§ 373.4595, Fla. Stat. (2002) ..... 10
§ 403.0885, Fla. Stat. (2002) ..... 5
§ 570.07(13), Fla. Stat ..... 2
§ 570.074, Fla. Stat. ..... 3
§ 570.085. Fla. Stat. ..... 3
§ 604.001(2) & (5), Fla. Stat ..... 3

TABLE OF AUTHORITIES—Continued


| OTHER AUTHORITIES | Page |
|---|---|
| S. Rep. No. 414, 92d Cong., 1st Sess. 139 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668... | 7 |
| S. Rep. No. 95-217, 95th Cong., 1st Sess. 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360..... | 7, 8 |


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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF *AMICI CURIAE* OF THE FLORIDA FRUIT & VEGETABLE ASSOCIATION, FLORIDA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, and CHARLES H. BRONSON, as FLORIDA COMMISSIONER OF AGRICULTURE IN SUPPORT OF THE PETITION

The Florida Fruit & Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and Florida Commissioner of Agriculture respectfully submit this brief as amici curiae[1].

[1] Counsel for *amici curiae* has authored this brief in whole and no other person or entity other than *amici*, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

## INTEREST OF *AMICI CURIAE*

The Florida Fruit and Vegetable Association is a non-profit, agricultural trade organization headquartered in Orlando, Florida. Its mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. The Florida Fruit and Vegetable Association represents and assists its membership on a broad range of farming issues, including environmental protection, marketing, labor, food safety, and pest management. These services help Florida growers set the standard for competitively producing an abundant supply of safe, affordable fruits, vegetables and other crops. Its members produce much of the winter vegetable crop for the United States.

The American Farm Bureau Federation is a voluntary general farm association organized in 1920. It was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. American Farm Bureau Federation has member organizations in all 50 states and Puerto Rico, representing more than five million member families.

The Florida Farm Bureau Federation is one of the constituent members of the American Farm Bureau Federation. It represents the interests of farmers and ranchers in Florida. The Florida Farm Bureau Federation is composed of 62 county farm bureaus with more than 143,400 member families. It is headquartered in Gainesville, Florida.

Charles H. Bronson, the Florida Commissioner of Agriculture, supervises all matters pertaining to agriculture in the State of Florida, pursuant to Article IV Section 4(f) of the Florida Constitution, except as otherwise provided by law. The Commissioner of Agriculture is also the head of the Florida Department of Agriculture and Consumer Services under Section 20.14(1) Florida Statutes, and is statutorily charged with the duty to "protect the agricultural and horticultural interests of the state" under Section 570.07 (13),



Florida Statutes. The Florida legislature has declared in Section 604.001(2) & (5) Florida Statutes that "[t]he production of agricultural commodities in this state is a large and basic industry that is important to the health and welfare of the people and to the economy of the state" [and] "that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable." Finally, under Sections 570.074 and 570.085, Florida Statutes, the Commissioner has created and oversees an office of water coordination for the purpose of engaging in any matter "relating to water policy affecting agriculture, application of such policies, and coordination of such matters with state and federal agencies."

The Commissioner's participation in this matter flows from his constitutional and statutory duty to protect Florida agricultural food products and the interests of all Florida citizens involved in or affected by issues impacting the continued viability of agricultural operations in the state.

American farmers and ranchers represented by the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, and American Farm Bureau Federation own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fibre and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether.

American farm products remain competitive in the world market due in part to the regulatory scheme of one environmental law, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. The CWA does this by providing agricultural exemptions for the discharge of waters used for the production of crops. 33 U.S.C. §§ 1342(l) and 1362(14). These

exemptions are part of the National Pollutant Discharge Elimination System ("NPDES") component of the CWA, a permit program to limit the discharge of industrial wastes into the nation's waters. *See* 33 U.S.C. § 1342 ("Section 402").

If the Eleventh Circuit's decision stands, the South Florida Water Management District ("SFWMD") will have to increase its budget to pay for the expensive NPDES permitting process for S-9, the pump station that moves water from one side of a levee to the other in the same watershed. The SFWMD will more than likely obtain the funding to obtain and implement this NPDES permit by increasing agriculture privilege taxes, ad valorem taxes on property owners in the District, fees, and assessments. *See, e.g.*, § 373.503, Fla. Stat. (2002). This would significantly and adversely impact the ability of farmers and ranchers to competitively market their crops in today's international markets. It is possible the technologies required by the permit will compel the creation of stormwater treatment areas. If that is the case, the SFWMD may use its condemnation power to take the land of farmers and ranchers, thereby further adversely impacting them.

Farmer and rancher members in the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and the Florida Commissioner of Agriculture have a direct economic interest in the outcome of this case. The interest is to ensure the agricultural exemptions from the NPDES program continue to be effectively implemented as in the past. If the Eleventh Circuit's decision is not reversed, the effective impact of the agricultural exemptions could be eroded and thwarted through increased taxes, fees and/or assessments imposed by the SFWMD to pay for NPDES permits and technologies for the S-9 pump station. In addition, the District's 61 other pumps like it that move water within the same watershed will likely require NPDES permits, all at a substantial cost the SFWMD will pass on to farmers, ranchers, and others.



## ARGUMENTS

### I. THE ELEVENTH CIRCUIT'S DECISION WOULD HAVE THE EFFECT OF OVERRIDING THE AGRICULTURAL EXEMPTIONS OF THE NPDES PROGRAM.

#### A. Agricultural Exemptions from the NPDES Program

The CWA prohibits the discharge of pollutants into the waters of the United States unless the discharge is allowed by the NPDES component of the CWA. 33 U.S.C. § 1311(a); *see Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1524-1525 (11th Cir. 1996). Permits for discharges into the nation's waters are issued by the United States Environmental Protection Agency ("EPA") or by a state permitting program. 33 U.S.C. §§ 1342(a) & 1342(c). EPA authorized Florida's Department of Environmental Protection ("FDEP") to administer the NPDES program in 1995. *See* § 403.0885, Fla. Stat. (2002).

The NPDES program does not require permits for discharges from the production of agricultural crops. It expressly provides exemptions for agricultural discharges. 33 U.S.C. §§ 1342(l) and 1362(14). The Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and the Florida Commissioner of Agriculture seek to prevent a fundamental change in the implementation of these agricultural exemptions which the Eleventh Circuit's expansive decision appears to authorize.

The NPDES program limits the flow of pollutants into the nation's waters by regulating discharges from "point sources." A "point source" regulated by the NPDES program is defined in 33 U.S.C. §1362(14). Certain agricultural

discharges are excluded by definition from regulation by the NPDES program because they are not "point sources". A "point source" is defined as follows (emphasis added):

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*

The NPDES program also prohibits any permit requirements for agricultural discharges, stating in 33 U.S.C. § 1342(l):

> The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly require any State to require such a permit.

The rules implementing the agricultural exemptions explain by examples what is and is not a "point source" under the statutory definition of the NPDES program. For example, 40 C.F.R. §122.3(e) provides, in pertinent part, that the following discharges do not require NPDES permits:

> Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands. . . .

### B. Legislative History of the Agricultural Exemptions

The CWA originated from the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*. The CWA focused on regulating "point source" discharges which flow into the nation's waters. The 1972 amendments required effluent limitations to be placed upon



"point source" discharges through a federally mandated permit system, the NPDES program. Pub. L. 92-500, § 402; 86 Stat. 816, 880-883 (1972), *codified as amended* 33 U.S.C. § 1342 (2001).

The NPDES program did not cover nonpoint sources when the CWA was adopted in 1972; instead, these sources were left primarily to the states to address through a planning process described in the program. Pub. L. 92-500, § 208 (1972); 86 Stat. 816, 839-841, *codified as amended*, 33 U.S.C. § 1288 (2001); S. Rep. No. 414, 92d Cong., 1st Sess. 139, ("S. Rep. 92-414"), *reprinted in* 1972 U.S.C.C.A.N. 3668. As a consequence, when Congress adopted the NPDES program, it did not require a permit for agricultural runoff. Pub. L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (1972), *codified as amended*, 33 U.S.C. § 1288(b)(2)(F); S. Rep. 92-414, *reprinted in* 1972 U.S.C.C.A.N. at 3759-3760. As Senator Dole stated: "This bill would amend the Federal Water Pollution Control Act to place responsibility on the states for instituting and expanding the control of water pollution related to agriculture." S. Rep. 92-414 at 3759 (supplemental views of Sen. Dole).

In 1977, the exemption for "return flows from irrigated agriculture" was expressly added as an exclusion from the definition of "point source". Pub. L. 95-217, § 33(b); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1362(14) (2001). Also, the provision prohibiting NPDES permits for agricultural discharges was added. Pub. L. 95-217, § 33(c); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1342(l) (2001). The express exclusion from the definition of "point source" overrode a 1975 federal district court opinion holding the 1972 amendments to the Federal Water Pollution Control Act did not exclude point sources from agriculture from NPDES permitting. *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *affirmed sub nom. Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977).

The legislative history reveals Congressional intent that all sources of agricultural runoff, "regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F)." S. Rep. No. 95-217, 95th Cong., 1st Sess. 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360.

The exemption for "agricultural stormwater discharges" from the definition of "point source" was added by the Water Quality Act of 1987. Pub. L. No. 100-4, § 503; 101 Stat. 7, 75 (1987). By this exemption, Congress confirmed its intent that agriculture is not covered as industrial or municipal pollution under 33 U.S.C. § 1342(p).

A recent case interpreting the agricultural exemptions from the NPDES program is *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002). In that case, Closter Farms used "flood irrigation," a process where canals irrigate sugar cane. The canal water originates in Lake Okeechobee. It is forced from the canals "into the sugarcane fields by raising the water levels in the canals." *Id.* at 1297. The water is then discharged back into the lake. The grower also pumped the stormwater into Lake Okeechobee, rather than allowing it to follow its natural flow. The Eleventh Circuit held these discharges to the lake were not subject to NPDES program regulation. The court stated: "Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow. *See* 33 U.S.C. § 1362(14)." *Id.* at 1297. The court also held the canals used to irrigate the sugar cane fields through "flood irrigation" constituted a "return flow from irrigation agriculture," an activity excluded from the permitting requirements of the NPDES program. *Id.*



### C. Effect of Eleventh Circuit's Decision on the Agricultural Exemptions

If the Eleventh Circuit's decision is allowed to stand, the SFWMD will have to treat the water pumped at S-9 in order to remove some of the pollutants in it, none of which have been added by the SFWMD. This water may contain pollutants from agricultural discharges exempted from the NPDES program. The treatment of water at S-9 will be expensive. Just the preparation of the NPDES application will be costly, requiring detailed data and modeling prepared by experts. In addition, the SFWMD will have to construct and implement treatment and monitoring technologies required by the resulting NPDES permit, assuming there are such technologies.

The SFWMD will bear the cost of the NPDES permitting process, as well as cost of the installation and monitoring technologies to treat the water at the S-9 pump station. The SFWMD will have to pay for these substantial costs by increasing one or more of its funding sources, which include ad valorem taxes on properties within the SFWMD's jurisdiction, agricultural privilege taxes, permit fees, and assessments. *See, e.g.*, § 373.503, Flat. Stat. (2002) (ad valorem taxing authority). Farmers and ranchers who own farms, groves and ranches in the SFWMD may therefore have to pay for the removal of pollutants required by an NPDES permit for S-9, even though agricultural discharges to the waters pumped by S-9 are exempt from the NPDES permitting program. Consequently, the benefits of the agricultural exemptions may be effectively overridden by the Eleventh Circuit's decision.

The additional regulatory costs created by the NPDES permit for S-9 may be passed to farmers and ranchers, and may increase the costs of producing agricultural products, resulting in a diminished ability to be competitive in the world market. As a consequence, the economic benefits

realized from the agricultural exemptions would be substantially eroded. If the Eleventh Circuit's decision stands, S-9 will be just one of 62 SFWMD pumps that may be required to have NPDES permits. The adverse economic impact on farmers and ranchers could be enormous.

## II. THE ELEVENTH CIRCUIT ERRED IN FINDING THE MOVEMENT OF WATER IN THE LAKE OKEECHOBEE WATERSHED IS SUBJECT TO THE NPDES PROGRAM.

The SFWMD has responsibility to protect Florida's public water resources in the Lake Okeechobee watershed. § 373.4595, Fla. Stat. (2002). The U.S. Army Corps of Engineer's Central and Southern Florida Flood Control Project manages this responsibility, under the local sponsorship of the SFWMD. § 373.1501, Fla. Stat. (2002). There are many components in the complex system managing the water in this watershed, one of which is the S-9 pump. The S-9 pump facilitates the movement of water from one side of a levee to another within the watershed. S-9 is permitted under the Everglades Forever Act by the Florida Department of Environmental Protection ("FDEP"). § 373.4592(9)(k) & (l), Fla. Stat. (2002). The Everglades Forever Act has been approved as a part of Florida water quality standards by EPA.

In view of the above, the regulatory scheme for the Lake Okeechobee watershed controls sources of pollution. For that reason, there is no need, or authority, to ignore a statutory exemption and attempt to control nonpoint sources of pollution through judicial fiat. Yet that is the effect of the Eleventh Circuit's decision which declares the movement of water within the watershed is a "point source," when the SFWMD itself adds no pollutants to the water S-9 pumps.



## III. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE A CONFLICT AMONG CIRCUITS OVER THE APPLICABILITY OF THE NPDES PROGRAM TO THE MOVEMENT OF WATER CONTAINING PRE-EXISTING POLLUTANTS.

There are five significant federal circuit court decisions which have considered the general issue in this case. That issue is whether the discharge of water requires a permit even if the pollutants in the discharge are naturally occurring or added only by others. The decision of the Eleventh Circuit appears to conflict with decisions of the Fourth, Sixth, and District of Columbia Circuit Courts of Appeal.

Three federal district courts have interpreted the NPDES program to allow entities to move water without a permit if they have not added pollutants to it. The earliest case is *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976). In *Train*, the Fourth Circuit held that EPA's authority to regulate point source discharges of pollutants did not apply when the water being discharged by the power company contained pollutants not added by the company. *Id.* at 1373 and 1377. In the court's opinion, naturally occurring pollutants or those previously added by others did not subject the company to the NPDES permitting procedures. In order to be subject to the NPDES program, the discharging entity must have actually added the pollutants. *Id.* at 1377.

The next case dealing with this issue is *National Wildlife Federation v. Gorsuch*, 693 So.2d 156 (D.C. Cir. 1982). In this case, the court agreed with EPA's position that the "addition [of pollutants] from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175. As a result, the NPDES program did not require "dam-induced water conditions" to be treated as "pollutants." *Id.* at 172. In so holding, the court observed: "Congress, although recognizing

the weaknesses of past state water pollution efforts, explicitly chose not to completely federalize water pollution control, but instead directed the states to establish their own pollution control programs under EPA oversight." *Id.* at 178. In reaching this decision, the court noted that "as a policy matter (and recognizing our limited role in reviewing agency policy decisions) we are not convinced that EPA's decision to leave dam regulation to the states was so misguided as to frustrate congressional policy. EPA contends that requiring permits for 2,000,000 dams would be an impossible task." *Id.* at 182.

Finally, in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the Sixth Circuit held that a hydro-electric facility's movement of pollutants already in water could not be considered an "addition of pollutants" regulated by the NPDES program. The court was particularly persuaded by the provision in the CWA allowing states to regulate nonpoint sources, including pollution from "dams, channels, flow diversion facilities, or other changes in the movement, flow or circulation of a navigable water." *Id.* at 588, refering to 33 U.S.C. § 1314(f)(2)(F).

Two other federal circuit courts have construed the NPDES program as prohibiting the movement of water, even though the entities moving the water did not actually add pollutants before or during the move. The most recent case is *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). In *Catskill*, the city used a tunnel to move water from one water body to another that was "hydrologically connected only insofar as both are tributaries of the Hudson" River. *Id.* at 484. The Second Circuit found it significant that the water was tunneled several miles from its source into a water body "utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed." *Id.* at 492.



In an earlier case, the First Circuit required a NPDES permit when a ski company moved water from a river, used it to make snow, and then discharged it into a pond. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1272 (1st Cir. 1996). The company did not add any pollutants during this process. The First Circuit distinguished *Gorsuch* and *Consumers Power* cases as they did not involve "moving different water from one flowing water body into another stationary, colder body." *Id.* at 1299.

These five cases all involved interpretations of the phrase "addition of any pollutant" in 33 U.S.C. § 1362(12). Three federal circuit courts limit jurisdiction of the NPDES program when there has been no introduction of pollutants during the movement of water from one place to another. Two courts reach the opposite result, holding that the entities moving the water may need NPDES permits even though the pollutants added to the receiving water body were not added by them.

In the instant appeal, the Eleventh Circuit adopted the rationale of the First and Second Circuits, thereby requiring the SFWMD to apply for a NPDES permit for S-9. The apparent split among these circuits warrants consideration of the conflict by this Court, particularly in view of the magnitude of the impact. For example, as the brief of the SFWMD reveals at page 24, if the Eleventh Circuit's decision stands, hundreds of thousands of water control structures will now need NPDES permits.

## CONCLUSION

The petition for writ of certiorari should be granted. If it is not granted, the Eleventh Circuit's decision will have the effect of overriding the agricultural exemptions in the NPDES program, thereby placing American farmers and ranchers at a significant disadvantage in marketing their crops in today's international market.

Respectfully submitted,

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No. 02-626

# In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
PETITIONER

*v.*

MICCOSUKEE TRIBE OF INDIANS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether petitioner's longstanding practice of pumping accumulated water from a water collection canal to a water conservation area within the Florida Everglades constitutes an addition of a pollutant from a point source for purposes of Section 402 the Clean Water Act, 33 U.S.C. 1342, where the water contains a pollutant but the pumping station source itself adds no pollutants to the water being pumped.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Statement | 1 |
| Discussion | 9 |
| Conclusion | 19 |


## TABLE OF AUTHORITIES


Cases:

| | |
|---|---|
| *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979 (D.C. Cir. 1997) | 10, 13 |
| *Catskill Mountains* v. *City of New York*, 273 F.3d 481 (2d Cir. 2001) | 11-12 |
| *Dubois* v. *United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997) | 11, 12 |
| *Fishermen Against the Destruction of the Env't, Inc.* v. *Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002) | 15 |
| *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) | 10 |
| *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) | 10 |
| *Northern Plains Res. Council* v. *Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003) | 14-15 |
| *United States* v. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567 (S.D. Fla. 1992), aff'd in part and rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied, 514 U.S. 1107 (1995) | 3, 4 |

Statutes, regulations and rule:

| | |
|---|---|
| Clean Water Act, 33 U.S.C. 1251 *et seq.* | 9, 15 |
| § 301(a), 33 U.S.C. 1311(a) | 7 |
| § 402, 33 U.S.C. 1342 | 2, 7, 9, 13 |
| § 502, 33 U.S.C. 1362 | 10 |
| § 502(6), 33 U.S.C. 1362(6) | 7 |
| § 502(7), 33 U.S.C. 1362(7) | 7 |

Statutes, regulations and rule: Page

§ 502(12)(A), 33 U.S.C. 1362(12)(A) ..... 7, 10
§ 502(14), 33 U.S.C. 1362(14) ..... 7
§ 505, 33 U.S.C. 1365 ..... 7
Flood Control Act of 1948, Pub. L. No. 80-858, § 203, 62 Stat. 1175 ..... 3
Water Resources Development Act of 1996, Pub. L. No. 104-503, 110 Stat. 3658:
§ 528(b)(1)(A)(i), 110 Stat. 3767 ..... 4
§ 528(f), 110 Stat. 3770 ..... 5
Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2571:
§ 601(a)(5), 114 Stat. 2680 ..... 5
§ 601(b), 114 Stat. 2680 ..... 14
§ 601(b)(1)(A), 114 Stat. 2681 ..... 5
§ 601(b)(1)(A)(ii)(II), 114 Stat. 2681 ..... 5
§ 601(b)(2), 114 Stat. 2681 ..... 5
§ 601(b)(2)(A)(ii)(I), 114 Stat. 2681 ..... 5
§ 601(b)(2)(C)(iv), 114 Stat. 2682 ..... 7
§ 601(b)(2)(C)(v), 114 Stat. 2682 ..... 7
§ 601(f)(2)(A), 114 Stat. 2686 ..... 5
§ 602(a), 114 Stat. 2693 ..... 2
Fla. Stat. Ann. (West):
§ 373.416 (2000) ..... 17
§ 373.416(1) (2000) ..... 18
§ 373.4592 (Supp. 2003) ..... 4
§ 373.4592(1)(a) (Supp. 2003) ..... 2
§ 373.4592(1)(d) (Supp. 2003) ..... 3
§ 373.4592(2)(h) (Supp. 2003) ..... 4
§ 373.4592(9)(k) (Supp. 2003) ..... 6, 17
§ 373.4592(9)(*l*) (Supp. 2003) ..... 6, 17
§ 373.4592(10) <http://www.flsenate.gov/data/session 2003A/Senate/bills/billtext/pdf/s0054Aer.pdf> ..... 18



Regulations and rule—Continued: Page

40 C.F.R.:
Pt. 122:
Section 122.28 ..... 17
Section 122.47 ..... 17
Pt. 123:
Section 123.25 ..... 17
Pt. 132, App. F ..... 13
Sup. Ct. R.:
Rule 10 ..... 13
Rule 10(c) ..... 16
Miscellaneous:
Marjory Stoneman Douglas, *The Everglades: River of Grass* (1947) ..... 2

# In the Supreme Court of the United States

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SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
PETITIONER

*v.*

MICCOSUKEE TRIBE OF INDIANS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

Petitioner South Florida Water Management District operates a pumping station that discharges water from a water collection canal through a levee into a water conservation area within Florida's Everglades. Pet. App. 2a-3a. The pumping station itself does not add any pollutant into the water being pumped. *Id.* at 3a. The water pumped from the water collection canal contains, however, higher levels of the pollutant phosphorus than the receiving water. *Ibid.* Respondents, the Miccosukee Tribe of Indians and the Friends of the Everglades, brought suit, arguing that petitioner must

obtain a permit under Section 402 of the Clean Water Act (CWA), 33 U.S.C. 1342, to engage in that activity. Pet. App. 2a. The district court ruled on summary judgment that petitioner must obtain a permit under the CWA for the pumping station and granted respondents' request for an injunction. *Ibid.* The court of appeals affirmed the district court's determination that a permit was necessary, but vacated the injunction and remanded the case for further proceedings. *Id.* at 14a. The United States urges the Court to deny the petition for a writ of certiorari because that fact-specific decision does not give rise to a conflict among the courts of appeals or otherwise present a question warranting this court's review.

1. The Everglades have been described as a "River of Grass" flowing from Lake Okeechobee to the Gulf of Mexico, with a width of up to 70 miles. Marjory Stoneman Douglas, *The Everglades: River of Grass* 10 (1947). Congress has identified this South Florida wetlands system as an important environmental "treasure" that "includes uniquely-important and diverse wildlife resources and recreational opportunities." Water Resources Development Act of 2000 (WRDA 2000), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693. See also Fla. Stat. Ann. § 373.4592(1)(a) (West Supp. 2003) (Florida Legislature "finds that the Everglades ecological system not only contributes to South Florida's water supply, flood control, and recreation, but serves as the habitat for diverse species of wildlife and plant life.") Congress has also determined that preserving "the pristine and natural character of the South Florida ecosystem," including the Everglades, "is critical to the regional economy." WRDA 2000, § 602(a), 114 Stat. 2693.



The Everglades have unique hydrological characteristics. Water historically flowed in a slow, unimpeded sheet from Lake Okeechobee down through the Everglades to the sea, but the construction of drainage canals and related structures, initially by the State of Florida and later by the United States Army Corps of Engineers, has altered that natural regime. See, *e.g.*, Pet. App. 3a n.2. In 1948, Congress authorized the Corps' construction of the Central and South Florida Project (C&SF), a vast system of levees, canals, water impoundment areas, and other water control structures, which are designed to promote the multiple objectives of flood control, drainage, preservation of fish and wildlife, and control of regional groundwater and salinity in South Florida. Flood Control Act of 1948, ch. 771, § 203, 62 Stat. 1175; Pet. 9; Pet. App. 2a-3a.

In 1988, the United States brought an action against petitioner and the Florida Department of Environmental Regulation, alleging, *inter alia*, that those agencies allowed phosphorus-polluted water to be diverted into the Everglades National Park in violation of state law and federal contracts. See *United States* v. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567, 1569 (S.D. Fla. 1992), aff'd in part and rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied, 514 U.S. 1107 (1995). Phosphorus levels are a defining element of the Everglades. In its natural state, the Everglades system is low in plant nutrients and organisms. It contains only limited amounts of phosphorus, which determines the type and distribution of aquatic flora and fauna. Adding phosphorus above natural levels causes an imbalance in the native flora and fauna and results in harmful growth. Pet. App. 16a-17a. See Fla. Stat. Ann. § 373.4592(1)(d) (West Supp. 2003) (Florida "Legislature finds that waters flowing into the Everglades

Protection Area contain excessive levels of phosphorus. A reduction in levels of phosphorus will benefit the ecology of the Everglades Protection Area.").[1]

The 1988 lawsuit resulted in a 1992 consent decree that required petitioner to construct stormwater-treatment areas, which are marshes designed to filter nutrients from farm-water runoff destined for the Everglades National Park. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. at 1569-1570. It also required Florida to undertake a regulatory permitting program designed to improve the quality of runoff entering the Everglades. *Ibid.* In response, the Florida Legislature enacted the Everglades Forever Act of 1994 to facilitate implementation of the consent decree. Fla. Stat. Ann. § 373.4592 (West Supp. 2003).

Congress later required the Secretary of the Army to develop a "comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem." Water Resources Development Act of 1996 (WRDA 1996), Pub. L. No. 104-303, § 528(b)(1)(A)(i), 110 Stat. 3767. Congress specified that the plan "provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades," and include features as "necessary to provide for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives served by the Central and Southern Florida Project." *Ibid.* Congress directed the Secretary to develop the plan in coordination with petitioner and in consultation with the South Florida Ecosystem Restoration Task Force, an intergovernmental body (with representatives from petitioner and one of the respondents, the Miccosukee Tribe) charged with coordinating the development of federal, state, and tribal policies and strategies to restore and protect the Everglades. WRDA 1996, § 528(f), 110 Stat. 3770-3772.

[1] The Everglades Protection Area encompasses the Everglades National Park, Water Conservation Areas 1, 2A, 2B, 3A, and 3B, and the Arthur R. Marshall Loxahatchee Refuge. Fla. Stat. Ann. § 373.4592(2)(h) (West Supp. 2003). Water Conservation Area 3A (WCA-3A) is one of the areas at issue in this action.



Four years later, in WRDA 2000, Congress approved the Comprehensive Everglades Restoration Plan (CERP) developed by the Secretary, which provides for modifications of the C&SF Project to "restore, preserve, and protect" the South Florida ecosystem (which includes the Everglades), "while providing for other water-related needs of the region, including water supply and flood protection." WRDA 2000, §§ 601(a)(5), 601(b)(1)(A) and 601(f)(2)(A), 114 Stat. 2680-2681, 2686. CERP is intended, in part, "to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment" of the ecosystem. *Id.* § 601(b)(1)(A), 114 Stat. 2681. To achieve CERP's goals, Congress has authorized more than one billion dollars in initial projects. See, *e.g.*, *Id.* 601(b)(2), 114 Stat. 2681-2683. In implementing those projects, the Secretary must "ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." *Id.* § 601(b)(2)(A) (ii)(II), 114 Stat. 2681.

2. This case involves particular existing water control facilities that now comprise part of the C&FS Project. In the early 1900s, the United States Army Corps of Engineers began excavating what is now known as the C-11 Canal to facilitate drainage of west-

ern Broward County. Pet. App. 3a. Later, in the 1950s, as part of the C&SF Project, the Corps built two north-south levees, L-33 and L-37, and a pumping station, S-9, which is located where the two levees meet, at the north end of L-33 and the south end of L-37. Pet. 9; Pet. App. 3a. Petitioner now operates the S-9 pumping station. *Id.* at 2a-3a.

The L-33 and L-37 levees formed the western boundary of the C-11 Basin, which encompasses western Broward County, and created Water Conservation Area-3A (WCA-3A), extending west of the levees. Pet. App. 3a. Historically, the C-11 Basin and WCA-3A had both been part of the Everglades and, prior to the construction of the canal and levees, water flowed across both areas and generally towards the south. *Id.* at 3a & n.2, 8a & n.8, 28a. Because of the construction of the levees and the canal, water from the C-11 Basin flows west into WCA-3A only if the S-9 pumping station is operating. *Ibid.*

The C-11 Canal runs through the C-11 Basin, collecting water run-off from the Basin and seepage through the levees from WCA-3A, and terminates at the S-9 pumping station. Pet. App. 3a. The S-9 station pumps the water from the canal through three pipes into WCA-3A at the rate of 960 cubic feet per second per pipe. *Ibid.* Petitioner has obtained a water quality permit for the S-9 pumping station pursuant to the Everglades Forever Act. See Pet. 12; Fla. Stat. Ann. § 373.4592(9)(k) and (*l*) (West Supp. 2003). See also WRDA 2000, § 601(b)(2)(A)(ii)(I), 114 Stat. 2681 (projects under CERP to be carried out with the Secretary of the Army "tak[ing] into account the protection of water quality by considering applicable State water quality standards").



The water that the C-11 Canal collects and that the S-9 pumping station conveys contains phosphorus at levels higher than those found in WCA-3A. Pet. App. 3a. The pump station itself, however, adds no pollutants to the waters being pumped. *Ibid.* If the S-9 pumping station were closed down, western Broward County would become flooded, displacing a large number of people. Pet. App. 3a, 10a.

Congress has taken actions to reduce adverse environmental effects associated with the C-11 Canal and WCA-3A. As part of CERP, Congress has authorized projects such as levee seepage management at WCA-3A and 3B, at a total cost of $100,335,000. It has also authorized $124,837,000 for the C-11 impoundment and stormwater treatment area. WRDA 2000, § 601(b)(2)(C)(iv) and (v), 114 Stat. 2682.

3. In 1998, respondents brought a citizen suit under Section 505 of the CWA, 33 U.S.C. 1365, alleging that petitioner was in violation of Section 301(a) of the CWA, which prohibits the discharge of any pollutant into navigable waters, except in accordance with the pertinent provisions of the Act. 33 U.S.C. 1311(a). The CWA defines the "discharge of pollutants" to include "any addition of any pollutant to navigable waters from any point source." CWA § 502(12)(A), 33 U.S.C. 1362(12)(A). Respondents alleged that, under the CWA's definitions, the S-9 pumping station is a "point source" that adds "pollutants" to WCA-3A. See 33 U.S.C. 1362(6), (7) and (14). In respondents' view, the CWA therefore obligates petitioners to obtain a National Pollution Discharge Elimination System (NPDES) permit pursuant to Section 402 of the CWA, 33 U.S.C. 1342, for operation of the S-9 pumping station. Pet. App. 2a, 17a-18a, 20a-21a.

On cross-motions for summary judgment, the district court denied petitioner's motion and granted summary judgment to respondents. Pet. App. 2a, 20a-21a, 31a-32a. The district court first noted that the parties agreed that both the C-11 Canal and WCA-3A are "navigable waters" under the CWA and that the canal water discharged from S-9 contains "pollutants." *Id.* at 21a. It then concluded that "an addition of pollutants exists because undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, both of which are separate bodies of United States water with * * * different quality levels." *Id.* at 28a. The court further concluded that S-9 "is a point source for which a NPDES permit is required." *Id.* at 29a. The district court enjoined petitioner from operating the S-9 pump station without an NPDES permit, but stayed its ruling pending appeal. *Id.* at 2a, 12a n.12, 31a-32a.

4. The court of appeals affirmed "the district court's judgment that the Water District violated the Clean Water Act," but vacated the injunction and remanded for further proceedings. Pet. App. 14a. The court of appeals noted that there was no dispute that the S-9 pump station constitutes a point source, that the waters released by the pump station contain pollutants, and that both the C-11 Canal and WCA-3A are navigable waters. *Id.* at 5a. The parties did dispute, however, "whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source." *Ibid.* The court of appeals concluded "that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters," *id.* at 7a, and that the S-9 pump station added pollutants to WCA-3A because, except for the operation of that pump station, the



polluted waters from the C-11 Canal would not have flowed there. *Id.* at 7a-9a. The court of appeals nevertheless vacated the district court's injunction, because "the district court could not have correctly balanced the possible harms—especially the harm to the public—caused by the enjoinment of S-9 against the benefits when it granted the injunction." *Id.* at 13a. Instead, the court of appeals directed the district court to "order the Water District to obtain an NPDES permit within some reasonable time period." *Id.* at 14a.

**DISCUSSION**

The court of appeals' decision requires petitioner to obtain a Clean Water Act permit for the operation of a pumping station that discharges polluted water from a water collection canal to the waters of a water conservation area. The water-control facilities are part of a larger, interlocking system to control the waters of the South Florida ecosystem, including the Everglades, which has a distinctive hydrological character, history, and regulatory regime. The court of appeals' decision, especially in light of its distinctive setting, does not warrant review at this time. It does not conflict with any decision of this Court or another court of appeals. And although the court of appeals' ruling could potentially subject petitioner to additional administrative burdens, the extent of those burdens at this juncture is uncertain and could be relatively modest. More importantly, the decision appears unlikely to result in any change in the operation of the pumping station or to subject petitioner to additional pollution control requirements beyond those that are already required under Florida's recently amended Everglades Forever Act. Under these circumstances, the Court should not review the court of appeals' interlocutory decision at

this time, but should instead await further developments under the unique statutory framework and factual context of this case.

1. *The court of appeals' decision does not give rise to a conflict with any decision of this Court or of another court of appeals.* The question in this case is whether petitioner's longstanding practice of pumping accumulated water from the C-11 Canal to WCA-3A constitutes a discharge of a pollutant from a point source for purposes of Section 402 of the CWA, where the water contains pollutants—in particular, excess phosphorus—but the S-9 pumping station that discharges the water adds no pollutants to the waters being pumped. That determination depends on the application of a series of statutory provisions that define the terms "pollutant," "navigable waters," "discharge of a pollutant," and "point source." See CWA § 502, 33 U.S.C. 1362. The application of those terms, in turn, often depends on fact-intensive inquiries. See, *e.g.*, *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979, 999 (D.C. Cir. 1997). In particular, this case involves the meaning of "discharge of a pollutant," which, as relevant here, means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A).

Petitioners contend (Pet. 14-18) that the courts of appeals are in conflict on the meaning of the statutory term "addition" in the context of whether Section 402 applies to water control facilities. Petitioners are mistaken. Over the years, the lower courts have distinguished between two situations for purposes of imposing NPDES permitting requirements on such facilities. The courts of appeals have ruled that, when a water control facility, such as a dam or pump, directs the flow of water from one part of a single water system to another part of the same water system, the



control facility does not result in the "addition" of a pollutant, even if the facility induces water quality changes, so long as the facility itself does not contribute new contaminants to the water. The courts encountered that issue in *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).[2]

Other courts of appeals have ruled, however, that when a water control facility transfers polluted water from one distinct and separate body of water to another less-polluted body of water, the transfer of polluted water results in an "addition" of pollutants to the more pristine body of water, and an NPDES permit is therefore required. The courts of appeals have addressed that issue in *Dubois* v. *United States Department of Agriculture*, 102 F.3d 1273, 1296-1299 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997), and *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New*

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[2] In *Gorsuch*, environmental plaintiffs petitioned EPA to impose NPDES permit requirements on dams that stored and periodically released water. The impoundment and release of stored water resulted in "dam-induced changes," including low dissolved oxygen, dissolved minerals and nutrients, temperature changes, and supersaturation. 693 F.2d at 161-164. The court of appeals concluded, in accordance with EPA's views, that the dam operator did not need to obtain an NPDES permit in that circumstance. *Id.* at 161, 170-183. In *Consumers Power*, environmental plaintiffs sought to impose NPDES permit requirements on a hydroelectric facility that drew water from Lake Michigan into a man-made impoundment above a dam and generated power by discharging the lake water back into the Lake through the dam's turbines. 862 F.2d at 581-582. Live fish, dead fish, and fish remains became entrained in the system and were returned to the Lake. *Id.* at 582-583. The court of appeals concluded that the dam operator also did not need to obtain an NPDES permit in that situation. *Id.* at 581.

*York*, 273 F.3d 481, 490-492 (2d Cir. 2001). Those decisions distinguished *Gorsuch* and *Consumers Power* on the basis that, in each of those latter cases, the water was returned to a water body that was essentially the same as that from which it came. See *Catskill Mountains*, 273 F.3d at 491-492; *Dubois*, 102 F.3d at 1299.[3]

In this case, the courts below ruled that the situation before it resembled *Dubois* and *Catskill Mountains*, rather than *Gorsuch* and *Consumers Power*, reasoning that the S-9 pump station transferred water between "two separate bodies of water," namely, the C-11 Canal and WCA-3A. Pet. App. 5a-9a, 28a-29a. The court of appeals accordingly concluded that the S-9 pump station's operation resulted in an addition of a pollutant from a point source and therefore required an NPDES permit. *Id.* at 9a.

If the court of appeals' characterization of the water control facilities in this case is correct, then its decision

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[3] In *Dubois*, a ski resort proposed to transfer water from a river at the base of the ski slope, use it to operate snow-making equipment, and then discharge it into Loon Pond, a small naturally occurring lake at a higher elevation. 102 F.3d at 1296-1297. The river was of lower water quality than the pond, which was colder and had lower levels of phosphorus, and would not normally flow into the pond. *Id.* at 1298-1299. The court held that, regardless of whether the resort's snow-making equipment contributed additional pollutants, the transfer required an NPDES permit. *Id.* at 1296 n.29. Similarly, in *Catskill Mountains*, the court of appeals held the City of New York's transfer of water allegedly containing suspended solids through a several-mile-long tunnel from a reservoir into a creek, which was naturally clearer and cooler than the reservoir and which the water would otherwise not reach, would also qualify as an "addition" of a pollutant for purposes of the CWA that required an NPDES permit. 273 F.3d at 484-485, 492.



simply follows the currently prevailing approach in the courts of appeals to discharges from water control facilities and presents no conflict with any decision of this Court or another court of appeals. The case would be similar to *Catskill Mountains* and *Dubois*, rather than to *Consumers Power* and *Gorsuch*. If the court of appeals' characterization of the particular water control facilities here is incorrect, and the case should instead be regarded as similar to the latter two cases, then there is also no conflict. Rather, in that event, the court's error rests on a fact-specific determination respecting only the proper characterization of those facilities, and that issue presents no issue of nationwide or general importance. In either event, in the absence of a showing of additional exceptional circumstances, there would be no "compelling reasons" for this Court to grant a petition for a writ of certiorari. See Sup. Ct. R. 10.[4]

In the United States' view, the lower courts' characterization of the water control facilities, which presents a mixed question of law and fact, may well be incorrect. The C-11 Canal and WCA-3A can appropriately be viewed, for purposes of Section 402 of the Clean Water Act, as parts of a single body of water. The characterization is appropriate because the C-11 Basin, the C-11 Canal, and WCA-3A share a unique, intimately related, hydrological association. Furthermore, those components were created and are managed

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[4] Significantly, none of the cases cited in the text would necessarily control other factually distinguishable situations, such as where an industrial facility withdraws water for an intervening use and reintroduces the water to the same waters of the United States. See *American Iron & Steel Inst.*, 115 F.3d at 998 (rejecting challenge to EPA's intake credits rule, 40 C.F.R. Pt. 132, App. F, Procedure 5(D) and (E), as unripe).

pursuant to legislative direction—by both the United States and the State of Florida—as a part of a single integrated resource. Indeed, in recognition of the unique characteristics of the South Florida ecosystem, Congress, in WRDA 2000, adopted and implemented the "Comprehensive Everglades Restoration Plan" to ensure a comprehensive, integrated approach to regulating and restoring the water quality of the area. See WRDA 2000, § 601(b), 114 Stat. 2680-2681.

Although the lower court's characterization of the water control facilities at issue as creating distinct bodies of water for CWA purposes may be incorrect, the correction of that error—which would turn on the characteristics of a number of special statutes, the historic and current hydrology of the Everglades, and characteristics of the water control facilities themselves—would involve a fact-intensive examination of record and non-record material in light of the interlocking framework of federal and state laws that govern water resources in the Everglades region. This Court does not normally undertake such an examination through the grant of a writ of certiorari.

2. *The court of appeals' decision does not present an issue of exceptual or nationwide importance.* Petitioner exaggerates in suggesting (Pet. 23) that the court of appeals "has fundamentally extended the scope of the NPDES program." The court of appeals decision appears to have limited precedential importance beyond the operation of the Everglades facilities. Because the court of appeals embraced and applied the distinction under existing case law between water control facilities for single water systems and water control facilities that direct flow from one water body to another, its decision makes no change in the relevant case law and thus breaks no new doctrinal ground. See



*Northern Plains Res. Council* v. *Fidelity Exploration & Dev. Co.*, 325 F.3d, 1155, 1162 (9th Cir. 2003) (citing *Catskill Mountains*, *Dubois*, and the decision in this case for the proposition that "other circuits have held that transporting water from one water body to another can violate the CWA").[5]

Indeed, the court of appeals' decision in this case may have circumscribed consequences even with respect to the Everglades facilities. Six months after it decided this case, the Eleventh Circuit decided *Fishermen Against the Destruction of the Environment, Inc.* v. *Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002), which involved application of the CWA to drainage canals serving farmland previously submerged part of the year under Lake Okeechobee, but now separated from the Lake by a dike. See *id.* at 1296. The canals transported and discharged into Lake Okeechobee excess water that collected on the farmland. *Id.* at 1296-1297. The court of appeals recognized that the CWA exempts "agricultural stormwater discharges and return flows from irrigated agriculture" from the

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[5] This Court may ultimately have occasion to review whether the principle followed in *Catskill Mountains* and *Dubois*—that a discharge of polluted water from one body of water to a distinct and more pristine body of water requires an NPDES permit—is correct. But at the present time, no court of appeals has squarely considered and rejected the reasoning of those decisions, which involve a relatively narrow and perhaps unrepresentative sample of situations in which the issue might arise. This case presents a particularly unsuitable occasion to reach that issue because, as noted above, the court of appeals may well have erred in treating the C-11 and the WCA-3A as separate water bodies, there is an alternative statutory scheme in place for addressing water quality, specifically including phosphorus levels, on a comprehensive basis in the Everglades, and the predicate for applying that principle may not be truly present in this case.

definition of "point source," and accordingly ruled that the canals and associated pumping facilities transporting water from the farmland were exempt from the NPDES requirement. *Ibid.* Far from applying a blanket rule that all movement of water requires an NPDES permit (see Pet. 23), the court of appeals recognized the need, even after the decision at issue here, to give careful consideration to the facts in each case.

3. *The court of appeals' decision is unlikely to subject petitioner to any substantial new pollution control requirements.* This Court's Rules provide that a writ of certiorari may be appropriate, even in the absence of a conflict among the courts of appeals, if the lower court has decided "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This Court, however, does not lightly invoke that principle, and this case does not present circumstances warranting review on that basis. As an initial matter, the question here involves the application of statutory provisions to a particular factual situation. While the court of appeals may well have erred, its mistake arises from the misapplication of legal principles that have not generated any conflict among the courts of appeals. Furthermore, it is not clear at this time that the decision will impose inordinate burdens on petitioner, particularly in light of the court of appeals' dissolution of the district court's injunction. See Pet. App. 9a-14a.

The court of appeals ruled that the imposition of injunctive relief that could halt the operation of the S-9 pump station is inappropriate in light of the compelling public interest in the continued operation of that facility. See Pet. App. 12a ("From the record before us, we cannot conclude that the district court's injunction



could ever be properly enforced."). The court of appeals accordingly has directed that the district court merely "should order [petitioner] to obtain an NPDES permit within some reasonable period." *Id.* at 14a. The burden that this obligation entails is currently uncertain and may be relatively modest.

For example, the permitting authority in this case—the Florida Department of Environmental Protection—may be able to issue a general permit that considerably streamlines the permitting process. See 40 C.F.R. 122.28, 123.25. Furthermore, an NPDES permit can provide considerable flexibility in any schedules for compliance. See 40 C.F.R. 122.47. And it appears at least questionable that the NPDES permit would subject petitioner to any significant environmental obligations beyond those that petitioner already faces under other existing laws.

Petitioner was required to obtain a state water quality permit for the S-9 pump station pursuant to the Everglades Forever Act, which requires that petitioner comply to the maximum extent practicable with state water quality standards according to phased—in compliance schedules and strategies set forth in the permit. Pet. 12; Fla. Stat. Ann. § 373.4592(9)(k) and (*l*) (West Supp. 2003). An NPDES permit for S-9 could take a comparable approach, replicating the standards and compliance schedule in the existing state permit. Moreover, the Everglades Forever Act, as recently amended, includes a requirement that, by December 31, 2006, petitioner and the State of Florida

> take such action as may be necessary * * * so that water delivered to the Everglades Protection Area achieves in all parts of the Everglades Protection

> Area state water quality standards, including the phosphorus criterion * * *.

*Id.* § 373.4592(10) <http://www.flsenate.gov/data/session/2003A/Senate/bills/billtext/pdf/s0054Aer.pdf> (at p. 42). See note 1, *supra* (describing the Everglades Protection Area). Sections 373.4592(9)(k) and (*l*) further require that petitioner comply with Section 373.416 of the Florida Statutes, which requires that

> the operation or maintenance of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works * * * will not be harmful to the water resources of the district.

*Id.* § 373.416(1). In addition, the Comprehensive Everglades Restoration Plan, which Congress approved through WRDA 2000, authorizes specific projects to address water quality concerns, including projects specifically directed at WCA-3A. See p. 5, *supra*.

In light of the focused federal-state attention to restoring the Everglades, including WCA-3A, on an ecosystem-wide basis, the NPDES permitting process may be reconcilable with, and integrated into, those ongoing efforts. In any event, that process appears unlikely to result in any change in the operation of the pumping station or to subject petitioner to additional pollution control requirements beyond those currently required or planned under federal or state law. The same may hold true if, as petitioner fears (Pet. 4), other courts later conclude that other similarly situated pumping stations are subject to NPDES permitting requirements.

Consequently, the Court's review in this case may have little practical significance for petitioner's actual obligations or for the water quality of the Everglades. Furthermore, because the court of appeals' decision is



interlocutory, petitioners will have an opportunity to seek relief from the court of appeals, or this Court, if the district court's order on remand results in unexpected hardship. In light of all these circumstances, and the absence of any conflict among the courts of appeals or other compelling reasons justifying the issuance of a writ of certiorari, the United States submits that the court of appeals' decision does not warrant review at this time.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-626

IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents*.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

**BRIEF OF AMICI CURIAE THE NATIONWIDE PUBLIC PROJECTS COALITION, WEST VALLEY WATER DISTRICT OF CALIFORNIA, THE METROPOLITAN DENVER WATER AUTHORITY OF COLORADO, THE COBB COUNTY-MARIETTA WATER AUTHORITY OF GEORGIA, AND THE WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT OF CALIFORNIA IN SUPPORT OF PETITIONER**

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36 pp

Page

TABLE OF CONTENTS

Interests of the Amici Curiae ..... .1

Summary of Argument ..... .4

I. *MICCOSUKEE's* INTERPRETATION OF THE TERM "ADDITION OF POLLUTANTS" COULD HAVE A SIGNIFICANT ADVERSE EFFECT ON VITAL WATER SUPPLY, TRANSMISSION, TREATMENT AND DELIVERY SYSTEMS ..... .5

A. The Eleventh Circuit's "But For" Test Would Require NPDES Permits for Every Transfer of Water Within a Managed Water System Despite the Fact that the Constituents Transferred are Already in the Water and Are Not "Pollutants" Added from the Outside World. ..... ..6

B. If Affirmed, the Eleventh Circuit's Holding Will Make it Very Difficult for Water Supply Facilities to Efficiently and Effectively Meet the Public's Critical Water Supply Needs. ..... ..9

C. The NPDES Permit Process is Costly and Time-Consuming ..... 14

II. *MICCOSUKEE* IMPROPERLY MERGES TWO COMPLEMENTARY, BUT DISTINCT, MANDATES OF THE CWA..... 17

III. THE ELEVENTH CIRCUIT'S BROAD INTERPRETATION OF "ADDITION OF POLLUTANTS" VIOLATES THE FUNDAMENTAL PRINCIPLE OF FEDERALISM THAT ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES ..... 20

A. Nothing In The CWA Evinces A Clear Statement That Congress Intended To Encroach Upon Local Regulation of Water Management and Supply Activities That Do Not Add Pollutants..... 21

B. The States Have Enacted Comprehensive Water Quality Protection Statutes That Will Be Supplanted by this Expansion Of the CWA..... 24

Conclusion..... 29



Page

## TABLE OF AUTHORITIES

*Cases:*

*Gregory v. Ashcroft*, 501 U.S. 452 (1991) . . . . . .21, 22

*Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002). . . . . .5

*National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988). . . . . 7

*Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). . . . . 23, 24

*Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990). . . . . 7

*Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002). . . . . 18, 19

*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). . . . . 20-22

*United States v. Bass*, 404 U.S. 336 (1971) . . . . . 22

*United States v. Lopez*, 514 U.S. 549 (1995). . . . . 21

*U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992). . . . . .24

*Statutes:*

Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2002). . . . . 3

CWA section 101, 33 U.S.C. § 1251. . . . . 22

*Statutes, continued:* Page

CWA section 208, 33 U.S.C. § 1288. . . . . 23

CWA section 301, 33 U.S.C. § 1311. . . . . 5, 20

CWA section 303, 33 U.S.C. § 1313. . . . . 18, 19

CWA section 402, 33 U.S.C. § 1342. . . . . 18

CWA section 502, 33 U.S.C. § 1362. . . . . 6, 7

CWA section 510, 33 U.S.C. § 1370. . . . . 23

Porter-Cologne Act, Cal. Water Code §§ 13260-13350. . . . . 25, 28

Water Quality Control Act, Colo. Rev. Stat. §§ 25-8-101 to 25-8-205. . . . . .25, 26

Fla. Stat. chs. 403.031-403.088. . . . . .26

Ga. Code Ann. §§ 12-5-21 to 12-5-23. . . . . 26

415 Ill. Comp. Stat. 5/3.550. . . . . .28

3 Pa. Cons. Stat. § 691.401. . . . . .26, 27

*Regulations:*

40 C.F.R. § 122.21 (2002). . . . . 14

40 C.F.R. §§ 124.10-124.14 (2002). . . . . 14

*Other Authorities:*

Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution* (1988). . . . . .27



*Other Authorities, continued:* Page

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U.S. Environmental Protection Agency, *Information Collection Request For National Pollutant Discharge Elimination System (NPDES)/ Compliance Assessment/Certification Information* (Draft), OMB Control No. 2040-0110, EPA ICR No. 1427.06 (2000) . . . . . .16

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*Other Authorities, continued:* Page

Watersheds, *State or Tribal Assumption Of the Section 404 Permit Program* (May 25, 1999). . . . . 28

Raymond A. Young & Ronald L. Giese, *Introduction to Forest Science* (2d ed. 1990). . . . . 8



The Nationwide Public Projects Coalition, headquartered in Colorado, the West Valley Water District of California, the Metropolitan Denver Water Authority, the Cobb County-Marietta Water Authority and the Wheeler Ridge-Maricopa Water Storage District of California, as *amici curiae*, respectfully submit this brief in support of Petitioner South Florida Water Management District.[1]

## INTERESTS OF THE AMICI CURIAE

The *Amici* are cities, water and wastewater districts, and private entities that serve public agencies that provide essential services to the public. *Amici* believe that, if upheld, the Eleventh Circuit's *Miccosukee Tribe of Indians v. South Florida Water Management District* decision would require virtually all entities that transfer water through a managed water system to obtain Clean Water Act permits for every stage of the transfer. This has profound implications for the ability of *Amici's* members to provide public services in a timely and cost efficient manner.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies that

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[1] The parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

are involved in water supply, flood control, irrigation, wastewater and stormwater management. These agencies represent some 15 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC's goal is to represent the public's interest in ensuring that vital public infrastructure services are provided in a safe, timely, affordable, and environmentally-responsible fashion. Consisting predominately of public agencies and firms that provide services to the public sector, NPPC's members must ensure that a fair balance is achieved between environmental values and the essential needs of the public.

The West Valley Water District of California ("WVWD") is an independent special water district that serves a population of approximately 55,000 citizens. WVWD routinely engages in interbasin transfers of water through various diversion structures in order to address fluctuations of available water from WVWD's sources.

The Metropolitan Denver Water Authority ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of 20 cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver, Colorado area and serves more than 1.5 million persons. MDWA member agencies are dependent on a number of interbasin water transfers to meet the water needs of their constituents.

The Wheeler Ridge-Maricopa Water Storage District of California ("WRMWSD") is a political



subdivision of the state of California that encompasses 228 square miles of mostly agricultural land. WRMWSD relies upon interbasin transfers to supply the growing demand for water of landowners within its jurisdiction.

The Cobb County-Marietta Water Authority ("CCMWA") is a political subdivision of the State of Georgia that supplies water to more than 700,000 people in the rapidly growing Metro-Atlanta area. CCMWA relies on interbasin transfers to meet the water demand of the citizens it serves while addressing the hydrological cycles of its water sources and other downstream water demands.

The outcome of this case will have a profound impact on the collective interests of *Amici* and the public they serve. Interbasin water transfers through various diversion structures are a necessity for countless water districts across the Country, especially in areas where the demand for water outpaces historic, localized supply. By requiring water districts to obtain Clean Water Act[2] ("CWA"), permits for these routine and critical water transfers, the Eleventh Circuit's decision would exponentially increase the costs of regulatory compliance and – at the same time – reduce the flexibility water districts currently enjoy to obtain needed water from a variety of sources. Without doubt, the ultimate loser in this equation will be the consumer, who will face dramatically higher water costs in return for marginal to non-existent

[2] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2002).

environmental benefits. Indeed, such water quality issues are already being addressed under a different mandate of the CWA. Clear guidance from the Court is necessary to prevent further intrusion into such activities that traditionally have been, and should remain, outside the CWA's permit process.

## SUMMARY OF ARGUMENT

1) All bodies of water have distinct constituents. Therefore, the 11th Circuit's interpretation of "addition of pollutants" would require a permit for virtually every inter-basin transfer of water. This will have a significant impact on a wide spectrum of water management activities that in no way "add" pollutants to the waters they transfer.

2) The 11th Circuit improperly merges regulation of point source and "non-point" source pollution. Under *Miccosukee*, a party that transfers water becomes responsible for its physical characteristics by doing nothing more than redirecting such water. This is inconsistent with the two distinct regulatory mechanisms established by Congress.

3) The 11th Circuit's interpretation of the CWA violates fundamental principles of federalism by usurping state power absent a clear statement of congressional intent. The states are adequately addressing the non-point pollution at issue in this case.



## ARGUMENT

### I. *MICCOSUKEE's* INTERPRETATION OF THE TERM "ADDITION OF POLLUTANTS" COULD HAVE A SIGNIFICANT ADVERSE EFFECT ON VITAL WATER SUPPLY, TRANSMISSION, TREATMENT AND DELIVERY SYSTEMS.

The CWA prohibits "the discharge of any pollutant" into waters of the United States, except as otherwise authorized under the Act. 33 U.S.C. § 1311(a). A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A).[3] In *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11tn Cir. 2002) ("*Miccosukee*"), the Eleventh Circuit significantly expanded the definition of "addition of pollutants" to include situations where water is pumped from one water storage area into another as part of a water management system. Under *Miccosukee*, National Pollutant Discharge Elimination System ("NPDES") permits are required for virtually any water management transfer where water from one source would not have been depdsited in the receiving body "but for" the transfer.

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[3] The CWA defines "point source" in pertinent part as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel [or] conduit . . . ." 33 U.S.C. § 1362(14).

### A. The Eleventh Circuit's "But For" Test Would Require NPDES Permits for Every Transfer of Water Within a Managed Water System Despite the Fact that the Constituents Transferred are Already in the Water and Are Not "Pollutants" Added from the Outside World.

While *Miccosukee* addressed a specific type of water transfer (pumping of water from one side of a levee to another), *Amici* submit that under the Eleventh Circuit's broad definition of "addition of pollutants," virtually all water management systems would require NPDES permits for individual diversion structures. Put simply, the Eleventh Circuit's decision could potentially require a NPDES permit for every point of transfer along a managed water system, even when the conveyance merely redirects the water without adding any pollutants. Such an interpretation of "addition of pollutants" virtually guarantees that public entities providing water services would be forced into the time-consuming and costly NPDES permit process, despite the fact that – under any rational definition of the term – these water transfers do not "add" any pollutants.



The CWA broadly defines the term "pollutant."[4] Given that every individual body of water contains distinct constituents, Brian J. Skinner & Stephen C. Porter, *Physical Geology* 283-85 (1987), the transfer of water from one source to another will inevitably result in the "addition of pollutants" under *Miccosukee's* rationale.

Because an immeasurable variety of sources contribute to a body of water's constitution, no two waters are identical – even within a unitary hydrologic system. *Id.* at 299-300. Each separate body of water naturally contains a hodgepodge of material in varying occurrence and proportion based on the particular sources that contribute to the water and the physical characteristics of the water body itself. *Id.*

This can be true even within a unitary water storage basin where, for example, topography or

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[4] Under the CWA, a "pollutant" includes "dredged spoil, solid waste . . ., biological materials . . ., heat . . ., rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). In certain circumstances, various federal courts have determined that the distinct, naturally-occurring and artificial constituents comprising a water body fall within the CWA's definition of "pollutant." *See, e.g., Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) (citations omitted) (holding that dam-created fish remains constitute biological material pollutants); *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (accepting the EPA's judgment that pebbles, sand and other natural material may constitute regulable pollutants when discharged by mining operation).

human intervention have created two physically separate bodies of water. *See id.* at 291-98. As the two waters are separate, different sources will contribute to the overall constitution of each. Consequently, the separate bodies of water will possess varying chemical compositions, consisting of different types and ratios of organic and inorganic nutrients deposited by sources such as runoff, erosion, non-point source pollution, adjacent land use and exempted or previously permitted discharges. Raymond A. Young & Ronald L. Giese, *Introduction to Forest Science* 397-401 (2d ed. 1990). Similarly, each water will be influenced peculiarly by its own diverse topography, distinct tributaries, and heterogeneous substrate. Skinner & Porter, *supra*, at 292. These factors will produce varying flow rates among the waters, causing each to exhibit disparate temperatures, to produce distinct dissolved oxygen levels, and to possess a different capacity for carrying suspended solids. *Id.* at 272-79, 283-86; Young & Giese, *supra*, at 396-401. Finally, the different location of each water body will result in each water containing different types and amounts of biological material such as vegetative matter and animal remains.

Under the reasoning of *Miccosukee*, the simple act of re-combining these separated water bodies would be enough to require a NPDES permit. Indeed, under the Eleventh Circuit's "but for" test a regulable "addition of pollutants" occurs whenever any intra-system diversion structure moves water from one distinct body of water to another (a routine practice for water supply systems) even though no pollutants from the outside world have been added.



*Amici* are concerned that under *Miccosukee*, naturally occurring water constituents are transmogrified into regulable pollutants simply by flowing from one component of a water management system to another. Considering that every transfer of water also transfers that water's unique constituents (each of which would be classified as a "pollutant"), under the Eleventh Circuit's "but for" test, every discrete transfer of water within a water management facility will be considered an "addition of pollutants."

### B. If Affirmed, the Eleventh Circuit's Holding Will Make it Very Difficult for Water Supply Facilities to Efficiently and Effectively Meet the Public's Critical Water Supply Needs.

The Eleventh Circuit's holding will have a national impact; it is not limited to the unique hydrologic ecosystem found in the Florida Everglades or to the discrete type of water conveyance before the Court. *Miccosukee*'s rationale would require a NPDES permit for every water diversion structure that transfers any amount of water from one water body into another distinct body of navigable water. The impact of this decision is especially significant in light of the wide spectrum of water management and supply facilities found throughout the nation that the Eleventh Circuit's rationale will subject to the NPDES permitting process for the first time. Within such myriad water management systems there are millions of water diversion structures that qualify as point sources.

Among the water management and supply projects of *Amici* that would be regulated under the Eleventh Circuit's rationale are: facilities that ensure public safety, such as dams and flood control systems; facilities that serve agriculture, such as irrigation supply systems; water supply facilities that provide an adequate amount of safe drinking water; and, ecosystem and species preservation programs such as those that regulate water flow from lakes and reservoirs into rivers and streams. *See* Skinner & Porter, *supra*, at 283 (discussing the wide variety of indispensable uses for water management and supply infrastructure). *Amici* are aware of countless examples where there is a diversion structure that, while technically qualifying as a point source under the CWA, operates without adding any pollutants from the outside world into the water flowing through it. Yet, under *Miccosukee*, all structures will be forced into the NPDES permitting process.

The water management and supply facilities located along the Colorado River provide but one example of the countless projects that the Eleventh Circuit's interpretation will subject to the time-consuming and expensive NPDES permitting process. The Colorado River contains various water management and supply infrastructure that were constructed between 1938 and 1964. *Id.* at 282. This infrastructure includes a system of dams, reservoirs, canals and 400 kilometers of aqueducts that perform a variety of critical functions throughout the Southwest United States. *Id.* at 282-83. The Parker Dam provides most of the municipal water supply for Los Angeles and San Diego. *Id.* at 283. The Imperial



Dam furnishes irrigation water to farms throughout the Southwest. *Id.* Three other dams along the river generate hydroelectric power that customers throughout the region use as their primary source of electricity. *See id.* Within this water management system, there are numerous diversions and conveyance structures that move water from the dams/reservoirs into other waters of the United States. Under the Eleventh Circuit's holding, each of these facilities would be subject to the onerous NPDES permit process.

The particular plight of other NPPC members further illustrates the scope of projects that will be pulled into the NPDES permit process.

In California, an intricate water transfer and delivery system known as the State Water Project ("SWP") supplies water to two-thirds of California's citizens. The SWP's supply of more than four million acre-feet of water per year is largely drawn from the Feather River watershed in Northern California and then transported south by means of the Sacramento-San Joaquin River Delta, where the SWP water is commingled with water from the watersheds of the Sacramento River, American River, Stanislaus River, Mokelumne River, San Joaquin River, and many others. These diverse bodies of water each have different chemical compositions, including vastly different levels of phosphate, suspended solids, and other federally-recognized pollutants. As it moves south, SWP water is diverted to water districts throughout California, where it is often mixed again with local water supplies, which have their own unique chemical compositions.

If the *Miccosukee* decision stands, the transport and distribution of SWP water will become bogged down in a costly and time-consuming regulatory morass. Merely counting the number of times SWP water is combined with water from another distinct source during its trip south would be a challenge. The prospect of obtaining a separate NPDES permit for each of these combinations is a regulatory nightmare that would dramatically increase regulatory compliance costs and could force the State to rethink its entire water distribution system.

For example, the Wheeler Ridge-Maricopa Water Storage District, Kern County, California, which obtains most of its water supply via the California Aqueduct directly from the State Water Project, provides 197,088 acre-feet of water that is allocated and distributed to 72,074 acres of farm lands within the District's Surface Water Service Area under long-term agricultural water contracts. The District has an annual budget of $28.4 million. While most of the District's water supply comes from interbasin transfers under the SWP, the District has also been forced to secure additional dry year water supplies for its landowners from the Kern Water Bank, Pioneer Project and Berrenda Mesa Project. These projects lie along the Kern River and utilize flood flows and excess water supplies from that River, the Central Valley Project (which is an interbasin from the San Joaquin River watershed into Kern County) and the SWP. The District is very concerned over the delays, cost increases and restrictive permit conditions that could arise from NPDES permitting in both wet and dry years.



Another California agency and NPPC member, the West Valley Water District in Rialto, would face similar burdens. The District obtains its surface water from a small water body known as Lytle Creek which is a designated cold water stream by the Regional Water Quality Control Board. The creek water is normally diverted and used for the operations of electricity before it is distributed to water agencies through diversion. The District blends creek water with SWP furnished by a State Water Contractor who wholesales water to local agencies. At times, the District must divert its water back into the creek. If NPDES permits were required for these diversions, the District estimates that it would have to add other types of treatment prior to discharge back into the creek or for groundwater storage and recovery at substantial additional expense.

The impact of the Eleventh Circuit's decision on Metropolitan Denver, one of the fastest growing areas in the United States, would also be quite significant. The Metro Denver Water Authority ("MDWA"), serving suburbs within the Metropolitan Denver area, is supported by annual membership assessments based on the number of water and/or sewer taps provided. Most of the Authority member communities obtain their raw or treated water from the City of Denver. That city gets its water from watersheds including the South Platte, east of the Continental Divide, and the Colorado River, west of the Continental Divide, and shares it with its suburban customers. Denver then bills MDWA's members, whose rates include the costs of infrastructure and delivery. The additional costs of

NPDES permits that Denver would have to obtain for inter-basin transfers would undoubtedly be passed on to MDWA's customers.

### C. The NPDES Permit Process is Costly and Time-Consuming.

The burdens that the *Miccosukee* court's interpretation will impose on *Amici's* numerous water management and supply systems will be extreme. Under the Eleventh Circuit's expansion of NPDES permit jurisdiction, each of these facilities will be forced to shoulder the substantial financial and temporal burdens of acquiring a permit[5] and complying with its terms. In turn, new responsibilities will also fall heavily on state agencies, given that 44 states have assumed the NPDES permit program under the CWA. *See* Department of Interior, Office of the Inspector General (OIG), *EPA State Enforcement of Clean Water Act Discharges Can Be More Effective* 8 (2001).

An Environmental Protection Agency ("EPA") study on the financial and temporal burdens

[5] NPDES permit applications require parties to develop a complex data base to address issues such as water quality-based effluent limitations, monitoring and reporting of existing water quality conditions, best management practices, compliance schedules and various other procedures. *See* 40 C.F.R. § 122.21 (2002). This process also involves notice to the public with an opportunity for the public to challenge proposed permits at the administrative level – an undertaking that can render the NPDES permitting process interminable. *See* 40 C.F.R. §§ 124.10–124.14 (2002).



associated with simply acquiring a NPDES permit sheds some light into the costs that applicants and states will incur while negotiating the regulatory hoops of the permitting process.[6] EPA's data estimates that the total annual temporal burden to NPDES permit applicant respondents is approximately 1,990,775 hours – with an estimated 43,373 hours allocated to recordkeeping alone.[7] State governments will also commit significant resources in responding to permit application requests.[8] Permit applicants and state governments shoulder a hefty financial burden as well. The EPA study estimates that the total permitting cost to applicants is approximately $62,769,756.20 per year.[9] Notably, this figure accounts primarily for labor costs alone.[10] Further, state governments must shoulder an estimated cost of $1,289,488.89 each year.[11] All told, the EPA report anticipates that applicants and state governments will invest an

[6] *See* EPA, *Information Collection Request For Applications For National Pollutant Discharge Elimination System Discharge Permits and the Sewer Sludge Management Permits* (Final Draft), OMB No. 2040-0086, EPA ICR No. 0226.15 (1999), *available at* <http://www.epa.gov/icr/icrs/icrpages/0226ss15.htm>.

[7] *Id.* § 6(a)(i).

[8] EPA concludes that applicants and state governments together incur 2,038,694 hours in total burden attributed to the NPDES permitting process. *See id.* § 6(a)(iii).

[9] *Id.* § 6(b)(i).

[10] *See id.*

[11] *See id.* § 6(b)(ii).

estimated total of $64,059,245.10 to comply with the existing NPDES permitting process.[12]

In a separate study, EPA collected data to estimate the financial and temporal burdens associated with NPDES permit compliance assessments.[13] In this study, EPA determined that responding permittees incurred a total annual burden of 975,175 hours – 827,968 hours for recordkeeping and 147,207 hours for reporting.[14] The study also revealed that the responding permittees shouldered a staggering financial burden in the process of assessing compliance with their permits. EPA estimated that the total annual cost for permittees to conduct these compliance assessments amounted to approximately $23,046,452.[15] Importantly, this study and the ICR NPDES applicant study, *supra*, indicate only a portion of the immense financial and temporal investments inherent to the NPDES permitting

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[12] *See id.* § 6(b)(iii).

[13] This study pertains only to agencies, states and permittees determining the burdens associated with compliance assessments; it does not account for the mountainous investment of resources required to maintain actual compliance with NPDES permits. *See* EPA, *Information Collection Request for the National Pollutant Discharge Elimination System (NPDES)/Compliance Assessment/Certification Information* (Draft), OMB Control No. 2040-0110, EPA ICR No. 1427.06 § 1.b (July 2000), *available at* <http://www.epa.gov/icr/icrs/icrpages/1427ss06.htm>.

[14] *See id.* § 6.a.

[15] *See id.* § 6.d.



process. These studies represent only a fraction of the burdens that the Eleventh Circuit's "but for" test will thrust upon countless water management and supply facilities for the first time.

*Amici* submit that much of the inevitable financial burden of increased NPDES permits will ultimately fall on the shoulders of the American taxpayers. Parties that cannot bear the costs or meet the standards under NPDES (*e.g.*, effluent limitations, monitoring requirements) would be forced to alter or abandon their operations – possibly jeopardizing the supply of adequate drinking water in large cities, interrupting the flow of water to irrigation-dependent farms, disrupting the operation of flood control facilities that pump out encroaching water from populated areas, and encumbering efforts to protect threatened and endangered species and to preserve critical habitat. Hence, the American public will be forced to accept the aggregation of public safety risks associated with the possible disruption of flood control operations, the potential risk of an inadequate drinking water supply, and the seasonal impacts of the hydrologic cycle on irrigation-dependent agriculture.

## II *MICCOSUKEE* IMPROPERLY MERGES TWO COMPLEMENTARY, BUT DISTINCT, MANDATES OF THE CWA.

By requiring water management agencies such as SFWMD to address the pre-existing "pollutants" that are found in the waters that they seek to divert, the Eleventh Circuit improperly merges two complementary, but distinct, mandates

under the CWA. In effect, *Miccosukee* has enlarged the regulatory scope of the NPDES permit to require water management agencies to address "non-point sources" of pollution, which are traditionally regulated by states and localities under different CWA standards and requirements.

The NPDES permit program is not intended to address all potential sources of water pollution in our nation's waters. Indeed, NPDES is solely applicable to facilities that discharge pollutants from "point sources." *See* 33 U.S.C. § 1342. Other provisions of the CWA address "non-point" sources of pollutants. Non-point source pollution comes from a wide variety of human activities in the watershed as water runs off or moves through the ground, such as "runoff from farmlands, mining activity, housing construction projects, roads, and so on." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Non-point sources generally "cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point." *Id.* at 1025.

Addressing non-point source pollution is considerably more complex than "end of the pipe" NPDES permitting. Pursuant to CWA § 303(c), states must establish water quality standards and submit those standards to the EPA for review. *See* 33 U.S.C. § 1313(a)-(c)). To determine the water quality standards, the state designates a use for a particular body of water and then determines the level of water quality required to achieve that use. *See id.* § 1313(c)(2)(A).



Section 303(d) requires the EPA and the states to identify those water segments that are unable to meet water quality standards using traditional technology-based effluent limitations (i.e. permits) on point sources. *See id.* § 1313(d). These "impaired" water segments must be ranked according to the severity of their water quality problems. *See id.* States must then establish a Total Maximum Daily Load ("TMDL") for each pollutant that impairs the water segment and submit that list to EPA for approval. *See id.* § 1313(d)(2). "A TMDL is a specification of the maximum amount of a particular pollutant that can pass through a waterbody each day without water quality standards being violated." *Meiburg*, 296 F.3d at 1025 (citing 33 U.S.C. § 1313(d)(1)(C)).

*Miccosukee* ignores the division between point and non-point sources of pollution and fails to consider the ramifications this merger will have by forcing parties such as *Amici's* members to address non-point source pollutants. Under *Miccosukee*, a party that transfers water becomes responsible for its physical characteristics by doing nothing more than redirecting such water. Water management facilities will be forced to obtain NPDES permits and to retrofit their facilities to address pre-existing (and changing) water quality conditions despite having

added nothing to such water.[16] This is inconsistent with the CWA and fundamentally inequitable.

## III. THE ELEVENTH CIRCUIT'S BROAD INTERPRETATION OF "ADDITION OF POLLUTANTS" VIOLATES THE FUNDAMENTAL PRINCIPLE OF FEDERALISM THAT ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES

In requiring SFWMD to acquire a NPDES permit for a simple redirection of water, the Eleventh Circuit adopted an unprecedentedly broad interpretation of the statutory term "addition." As the Court held recently in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*"), in a decision construing the geographic scope of CWA jurisdiction, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources absent a "clear statement from Congress" that it

[16] Parties that obtain individual NPDES permits must meet certain effluent limitations, which are limits on the amount of pollutants that may be discharged. *See* 33 U.S.C. § 1311. Hence, the NPDES permit could be used to require the water management authority to remediate existing pollutants which are ever-changing, depending on up-stream conditions.



intended such a result. Just as it did when setting the geographic boundaries of jurisdiction, Congress did not seek to impinge on the States' traditional and primary power over land and water use when setting out the scope of activities regulated under the CWA.

### A. Nothing In The CWA Evinces A Clear Statement That Congress Intended To Encroach Upon Local Regulation of Water Management and Supply Activities That Do Not Add Pollutants

One of the principal tenets of federalism is that courts shall not interpret federal legislation to abrogate local power unless it is clear that Congress considered and intended, when it passed the authorizing legislation, to alter the traditional balance between federal and state powers. This "clear statement" principle applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting) (citation omitted). In cases where a court seeks to invoke the outer limits of Congress's power, there must be a clear indication that Congress intended that result. *See SWANCC*, 531 U.S. at 172. Indeed, this Court has recognized that there is an underlying assumption that the power to legislate in areas traditionally regulated by the States "is an extraordinary power . . . . [that] Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Of course, as long as Congress is acting pursuant to one of its enumerated powers, the Supremacy Clause of the Constitution permits Congress to trump state law, even in areas (such as land and water use) that by tradition fall within the state sphere. Nonetheless, under the "clear statement" principle, courts must not simply assume that Congress has used its power to override state authority. *See SWANCC*, 531 U.S. at 172-73. Rather, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to demonstrate that Congress intended to intrude into state interests. *See Gregory*, 501 U.S. at 464.

*Miccosukee's* intrusion into water supply projects will clearly upset the "cooperative federalism" inherent in the CWA. Section 101 of the CWA specifically limits the authority of federal agencies to intrude into state and local matters:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . .

33 U.S.C. § 1251(b). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or



jurisdiction of the States with respect to the waters . . . of such States." *Id.* § 1370(2).[17]

The division between the regulation of point and non-point source pollutants reflects this dual approach to reaching the CWA's lofty goals. "In so doing, the CWA uses distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) (citation omitted). While NPDES is based on "technological controls to limit the pollution point sources may discharge" the CWA "provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task," consistent with CWA § 101. *Id.* at 1126-27 (citations omitted).

A review of the plain language of the CWA provides nothing approaching a "clear statement" from Congress that it intended the CWA to regulate all intra-system water movement activities that somehow affect water quality. In truth, far from being "unmistakably clear" that Congress intended the statutory term "addition of pollutants" to encompass everyday activities such as water management or other routine water supply projects, Congress set forth the very specific limit that regulated activities must result in an "addition" of material in order to fall within the ambit of the CWA's NPDES control. The "pollutants" that *Miccosukee* would have regulated are more properly

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[17] *See also* 33 U.S.C. § 1288 (encouraging states to develop area-wide management plans).

addressed under the TMDL program. This careful balance between state and federal power should not be upset.

### B. The States Have Enacted Comprehensive Water Quality Protection Statutes That Will Be Supplanted by this Expansion Of the CWA

*Amici* recognize the legitimate objective of the CWA to protect the Nation's waters. However, § 402 of that Act does not cover all water movement activities that could potentially impact water quality. Fundamental principles of federalism dictate that activities such as water management, irrigation and drinking water supply, flood control and other routine water transfer uses are properly within the purview of state and local governments. Indeed, the Court has recognized that the CWA "establishes a distinctive variety of cooperative federalism" which authorizes a State to "administer" its own permit system that complies with federal statutory and regulatory requirements. *See U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 633 (1992); *see also Pronsolino*, 291 F.3d at 1140. As discussed above, the CWA bestows "primary" responsibility upon the states to protect water resources. The literally thousands of state and local governments that regulate navigable waters evidences that the



States have assumed this role.[18]

State-based clean water laws are typically far broader than their federal counterpart – regulating a wider spectrum of water management and supply projects. Of particular relevance to *Amici*, California's Porter-Cologne Act requires any discharger or potential discharger that "could affect the quality of the waters of the state . . ." to report the activity to a regional clean water control board. *See* Cal. Water Code § 13260(a)(1). The board then issues permit-like waste discharge requirements that account for water quality objectives, other waste discharges, the necessity of preventing discharge-related nuisances, and the beneficial uses the board seeks to protect. *See id.* § 13263. As its primary operative mechanisms, the Act prohibits any discharge of waste before a potential discharger files a report with the regional board and provides abatement authority to remedy unapproved discharges. *See id.* §§ 13264, 13304(a). In Colorado, the Water Quality Control Act establishes a state water quality control commission. Colo. Rev. Stat. § 25-8-101 *et seq*. The commission has the duty of setting state water quality standards and may promulgate "precautionary measures, both mandatory and prohibitory, that must be taken by . .

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[18] *See Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works,* 103d Cong. (1993) (statement of National Association of State Departments of Agriculture), *available* in LEXIS, Legis Library, Cngtst File.

. any facility, process, activity or waste pile that does cause or could reasonably be expected to cause pollution of any state waters in violation of control regulations or . . . any applicable water quality standard . . . ." *See id.* §§ 25-8-204, 25-8-205(1)(c). Similarly, Georgia's water pollution control law assigns to the state's Environmental Protection Division the responsibility "to regulate the withdrawal, diversion, or impoundment of the surface waters of the state . . . ." Ga. Code Ann. § 12-5-21(b). The law also establishes a state board with the authority to promulgate water quality standards and associated rules to address any water quality need on a state, regional, or local level. *See id.* § 12-5-23(a)(1).

Additional examples abound of state-based water pollution control laws that exceed CWA requirements. Florida's water pollution control law broadly defines "waste" to include "substances which may pollute or tend to pollute any waters of the state" and forbids any unauthorized discharge into state waters of "any waste which, by itself or in combination with the wastes or other sources, reduces the quality of the receiving waters below the classification established for them." *See* Fla. Stat. ch. 403.031(12), 403.088(1). Pennsylvania takes an equally broad approach with its Clean Streams Law, prohibiting any person or municipality from discharging "any substance of any kind or character resulting in pollution . . . ." *See* 3 Pa. Cons. Stat. § 691.401. Notably, the Pennsylvania statute's definition of "pollution" encompasses "contamination of any waters . . . including but not limited to such contamination by alteration of the physical, chemical



or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid, or other substances into such waters." *Id.*

In a similar vein, all fifty states, the District of Columbia, and the Commonwealth of Puerto Rico, have enacted laws that apply to non-point source discharges. *See* Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution*, 1 (1998). The states fill a critical role in the overall scheme of the CWA.

> Nonpoint source discharges, which consist generally of polluted runoff from farms, forests, land development and other activities, are not regulated under the federal Clean Water Act's National Pollutant Discharge Elimination System permitting program. Instead they are addressed primarily through nonregulatory means, such as planning, incentive and cost-share mechanisms . . . . Yet, increasingly, states are finding it necessary to deal with nonpoint source discharges that cannot be prevented, controlled, or abated adequately by these means.

*Id.*

Well aware of the comprehensive state-based initiatives discussed above, the EPA has also recognized the essential role of federalism in the

protection of water resources even as to the permitting of point source discharges, explaining:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the [Clean Water Act permitting] program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources, issues, and needs than are Federal regulators.[19]

Thus, there are ample state and local protections in place to facilitate more creative and, therefore, less burdensome regulatory schemes than under the federal system.[20] Such initiatives are directly threatened by the Eleventh Circuit's expansive interpretation of the statutory term "addition of pollutants."

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[19] U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the Section 404 Permit Program* (May 25, 1999), *available at* http://www.epa.gov/owow/wetlands/facts/fact23.html.

[20] For example, unlike the CWA, certain states protect both surface and groundwater. *See, e.g.*, Cal. Water Code § 13050(e); 415 Ill. Comp. Stat. 5/3.550.



## CONCLUSION

The *Amici* Nationwide Public Projects Coalition *et al.* respectfully request this Court to reverse the Eleventh Circuit's ruling in *Miccosukee*.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE

No. 02-626

In The
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## JOINT APPENDIX

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TABLE OF CONTENTS

Page

Relevant Docket Entries in the United States District Court For the Southern District of Florida ..... 1

Deposition of Sharon M. Trost ..... 3

Exhibit 5 ..... 18

Deposition of Dr. Timothy Bechtel ..... 23

Deposition of Ken Ammon ..... 48

Deposition of Bradley G. Waller ..... 51

Deposition of Tommy B. Strowd, Jr. ..... 70

Exhibit 9 ..... 106

Exhibit 10 ..... 107

Exhibit 11 ..... 108

Deposition of Ronald Jones ..... 114

Deposition of Samuel Eugene Poole ..... 138

Deposition of Richard Drew ..... 142

Plaintiff Miccosukee Tribe's Motion and Incorporated Memorandum of Law for Summary Judgment on all Counts of Tribe's Complaint ..... 147

Affidavit of Truman E. Duncan, Jr. ..... 156

Affidavit of Bradley G. Waller ..... 160

Affidavit of Dr. Ronald Jones ..... 164

Affidavit of Tommy B. Strowd ..... 170

Defendants' Statement of Undisputed Facts for Case Nos. 98-6056 and 98-6057 ..... 174

Affidavit of Sharon M. Trost ..... 179

TABLE OF CONTENTS – Continued

Page

Exhibit 2 ..... 181

Plaintiff Miccosukee Tribe's Response in Opposition to Defendants' Motion for Final Summary Judgment and Memorandum in Support and Response to Defendants' Statement of Undisputed Facts ..... 186

Affidavit of Bradley G. Waller ..... 192

Rebuttal Affidavit of Dr. Ronald D. Jones ..... 193

South Florida Water Management's Response to Miccosukee Tribe's Motion for Summary Judgment (Memorandum of Law included) ..... 196

Hearing Transcript (February 4, 1999) ..... 201

PETITION APPENDIX

Supreme Court of the United States Extension of Time for Petition ..... Pet. App. 35a

United States Court of Appeals for the Eleventh Circuit Order Denying Rehearing ..... Pet. App. 33a

United States Court of Appeals for the Eleventh Circuit Opinion ..... Pet. App. 1a

United States District Court Final Summary Judgment ..... Pet. App. 31a

United States District Court Order ..... Pet. App. 15a



**RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

**No.: 98-6056 CIV FERGUSON**

| No. | Date | General Description |
|---|---|---|
| | | |
| 72 | 11/19/98 | Deposition of Sharon M. Trost |
| 68 | 11/23/98 | Deposition of Dr. Timothy Bechtel |
| 70 | 12/2/98 | Deposition of Ken Ammon |
| 76 | 12/8/98 | Deposition of Bradley G. Waller |
| 69 | 12/14/98 | Deposition of Tommy B. Strowd, Jr. |
| 86 | 12/16/98 | Deposition of Ronald Jones |
| 71 | 12/22/98 | Deposition of Samuel Eugene Poole |
| 77 | 12/23/98 | Deposition of Richard Drew |
| 60 | 1/4/99 | Plaintiff Miccosukee Tribe's Motion and Incorporated Memorandum of Law for Summary Judgment on all Counts of Tribe's Complaint |
| 63 | 1/4/99 | Affidavit of Tommy Strowd, Jr. |
| 65 | 1/4/99 | Defendants' Statement of Undisputed Facts for Case Nos. 98-6056 and 98-6057 |

| | | |
|---|---|---|
| 74 | 1/4/99 | Affidavit of Sharon M. Trost |
| 82 | 1/20/99 | Plaintiff Miccosukee Tribe's Response in Opposition to Defendants' Motion for Final Summary Judgment and Memorandum in Support and Response to Defendants' Statement of Undisputed Facts |
| 84 | 1/22/99 | South Florida Water Management's Response to Miccosukee Tribe's Motion for Summary Judgment (Memorandum of Law Included) |
| 164 | 2/4/99 | Transcript of Hearing before The Honorable Wilkie D. Ferguson, Jr. |
| | | |



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and SAM POOLE,

Defendants.
_____/

CASE NO.: 98-6056-CIV-FERGUSON

FRIENDS OF THE EVERGLADES,

Plaintiff,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendants.
_____/

CASE NO.: 98-6057-CIV-FERGUSON

[The Following Joint Appendix Documents Were All Admitted In This Court.]

**Deposition of Sharon M. Trost**

November 19, 1998

* * *

[6] A. I'm the director of the Everglades Stormwater Program.

Q. And what are your responsibilities in that position?

A. My responsibility is to coordinate and implement a cross-functional program here at the District to make sure that water quality at structures that the District controls, that pump into, through or from the Everglades Protection Area, the water at [7] these structures will meet water quality standards by the year 2006. We're going to accomplish this through a number of different methods.

* * *

* * *

[10] A. I do not. My first real exposure to S-9 was probably in mid April of this past year. I mean I have always known where S-9 is located and so forth, but in March 20th when I was asked by Sam Poole to take over this program, I sat down and made a list of all the basins and I met with various people to find out what issues were in each basin and I knew that we wanted to do some work in the S-9 basin and I located correspondence to Miss Webster and then I proceeded to direct the preparation of the Section 319 grant and that's basically been my involvement. I believe you were in a meeting with me in mid May. Somebody named Childe was there also.

* * *



[12] A. . . . Are you familiar with the 319 process?

Q. Somewhat, but let's talk about it.

A. As you have more partners in that, you get more points and you have a better chance of being funded and they prefer the granting agency, which is the United States EPA, through the auspices of our DEP in Tallahassee, evaluates all the proposals that are submitted and they pick which ones should be funded. And it's always good – when a local governmental entity is the applicant, they have a better chance of being funded than if it's another state agency. So the Central Broward Water Control District has consultants that work for them, Montgomery Watson, Incorporated and Augustin Maristany is the lead engineer there, so we worked with Augustin Maristany and Pat Webster who at the time was chairman of the board of the Central Broward Water Control District. My staff, including Paul Warner, who is in my department of department staff, outlined the framework for what we hope would be a successful 319 grant proposal * * *

[15] Q. The C-11 West restoration project, is that that it's called?

A. Yes. It's an element of the Re-study. The Corps has developed a list of a number of what they call Critical Restoration Projects and the C-11 West is one of those projects.

* * *

[19] A. The proposal involved three major areas for [20] water quality improvements, to improve quality of water discharging into the C-11 West Canal. First of these was to install spillways at the secondary canal junctures

with C-11 West, the canals that pour into C-11 West; to raise up water levels in the surrounding sub-basins and to increase stormwater retention in the surrounding sub-basins, the thought being that if you can keep more stormwater in the sub-basin, minimize it from going into the canal, then you maintain a better water quality.

* * *

[22] Q. Okay. And what was the second item that you began to mention that would be used as part of the 319 grant?

A. The second item would be to deepen some of these secondary canals, to dredge them, to deepen them a little bit to increase their wet treatment detention capacity. See, there's not a lot of lakes in this area, so you need to figure a way to slow the water down before it enters the main canal.

* * *

[23] A. By routing through those lakes you can maximize the wet detention treatment. And we had smaller – those are the large ticket items as far as what cost the most in the proposal. We had other things in the proposal that included doing sediment traps and seeding of different types of grasses and different types of vegetation on some canal banks that needed more vegetation to slow water down or to trap sediments on it. There's a laundry list of Best Management Practices that are commonly used in urban environments and we were going through the ones that we felt would be viable in this area and put several of those in the proposal.

* * *



[24] Q. Were there any other water control districts or local government units involved in that application?

A. Yes. But I don't have the specific list, but we had approached a number of local government entities and asked them to participate and some of them had agreed to provide funding or in-kind services, but you'll have to get the final proposal to . . .

* * *

[27] Q. So you're not an expert, for instance, in water quality?

A. No, I am not.

* * *

[28] A. I am responsible for administering the Non-ECP permits, developing the regulatory action strategies, formulating water quality improvement strategies and directing any engineering, design or construction necessary to improve water quality in these basins. And the way I will do that is through directing all of these team members I mentioned earlier.

Q. So, what is the Regulatory Action Strategy for the Western C-11 Basin?

A. Well, the Regulatory Action Strategy is the same for all of the basins. It's a ten step process that we go through and then we tailor the water quality improvement strategy for each basin, depending on what we find as you move through this process.

We start out with an inventory of basin structures, and then with some baseline water quality data collection at primary structures, and then the Regulatory Action

Strategy moves this water quality monitoring further out into the basin and out into the sub-basins where you collect adequate water quality information to identify hot spots or areas where the water quality is not meeting the desired water quality standards.

The next framework of the Regulatory Action Strategy you pursue is in the area of the hot spot to identify the specific source of the water quality [29] problem and, once that is identified, you perform various types of analysis to determine what sort of Water Quality Improvement Strategy would be appropriate. Once you've identified the water improvement strategy, you're then kind of out. You know, you are trying to do this – because it's called Regulatory Action Strategy, you're trying to accomplish this through the permit holder by making sure the permit conditions are in force. Permit holder has implemented the best possible Best Management Practices or has performed other functions such as retaining stormwater or changing their practices to improve the water quality.

Where the regional aspect of this program comes into play, once you've achieved everything you can through the permit arena, then you'll have to step to some other level if you are not at the desired water quality standard. That's when you have to do some kind of regional engineering solution or design something or construct something that enables you to get the water cleaned up to the point where you – you know, to your target goal.

Q. Is there a time line for implementing this Regulatory Action Strategy? That's all the steps?

A. Yeah. I don't have the Regulatory Action [30] Strategy document in front of me. There's a time line. It's part of the Non-ECP permit. It's all in the permit. And we



have data being collected in these various basins, we have people – we've been approved for additional staff that we're hiring right now to move forward in all of these basins and I don't have the time line with me right now, but there is a specific time line to ensure that we can meet water quality standards by the year 2006.

* * *

[31] Q. And the S-9 pumps seepage water and canal water; is that correct?

A. I don't feel I'm qualified to answer exactly what it pumps. I'm not the right person for that.

* * *

[32] Q. Now, the – just to verify this, the S-9 does not have an NPDES permit; is that correct?

A. That's correct.

Q. There aren't any pending applications or anything like that?

A. That's correct.

* * *

[37] Q. You mentioned that you worked on the application or I think you put it you got the NPDES for the ASR for the project. What kind of NPDES project permit is that?

A. The problem with the ASR is that it doesn't really fit into the niche of how EPA defines the National Pollution Discharge Elimination System types. It's not really an industrial discharge, but I believe that we ended up in that classification and then as an experimental test well

because they have like various types of permits to fit something like aquifer storage and recovery. Because we're talking surface water, we're pumping it down into the Florida aquifer to determine if there's any water treatment benefits of reduction of nutrients before the water enters Lake Okeechobee. Then we recover the water through natural Artesian pressure and release the water back into the surface water canal and then it moves down into Lake Okeechobee. So that was basically considered a point source by the EPA, so even though we took it from a stream, you know, from runoff, put it into a well, when it came out of the well, we obtained that permit.

[38] Q. Where's that ASR project?

A. On Taylor Creek/Nubbin Slough up in Okeechobee County. It's just north of Lake Okeechobee and a canal bank, a canal that discharges into the lake. It's no longer – it has not been operational for eight or nine years. The well is closed off. It was an experiment we did as part of the LOTAC hearings of the mid to late 80's.

Q. So that was a situation – let me recap it and see if you can tell me if I got it right – where you took water, put it into the ground and then later retrieved the same or other water for use?

A. That water and other water that was there that mixed with it –

Q. Okay.

A. – and we had a mixing zone as part of the permit where we did the sampling for the compliance tests.

Q. And EPA considered that to be a point source: is that correct?



A. Yes.

MS. SOLE-CALAS: I'm going to object again to the form of the question.

Counsel, if you could just clarify.

BY MS. CARROLL:

[39] Q. If I can make my computer work, I can clarify.

EPA required you to have an NPDES permit for an ASR well; is that correct?

A. Yes.

Q. Was that a waste water permit?

A. I don't remember. I haven't looked at those documents for eight or nine years.

Q. Was the water of a higher quality when it came out of the well than it was when it went in?

A. Yes. In terms of nutrients it was, but it was worse in terms of salinity.

* * *

[46] A. Then when you identify the problem, to see whether or not they are in violation of some aspect of the permit. Then we have the ability, through our existing regulatory authority, to get them to implement some kind of Best Management Practice or some other engineering design or structure or something to try to enhance the water quality.

Q. So when you were saying that you might be able to do something sooner, you were talking about existing permit conditions that would have to be enforced?

A. Right. If they are in violation.

* * *

[48] A. I'm aware of three major 298 districts.

Q. Are all those – all three are 298 districts?

A. I know that Central and Southern are. I don't know if Weston is considered a 298 district, but they are their own water management system and throughout that development.

Q. Does the District permit activities of these water control districts? Do you have a regulatory –

A. What do you mean activities of them?

Q. Well, do you issue – I guess what I'm asking is do you issue any kind of permit to the districts themselves, the water control districts?

A. Well, we do issue permits to 298 districts, but I'm not familiar. I am not the person to ask about what permits our Regulation Department has issued in this area.

* * *

[60] Q. When you talked about the Regulatory Action Strategy and steps involved with that, you mentioned a – eventually potentially using some kind of a regional treatment facility. Do you know what step that would be at in the –

A. That would be towards the end of the ten steps. You mean actually building it?



Q. Yeah.

A. That would be at the end of the ten steps. That's when you identify specifically what the water quality improvement strategies need to be and then you start, you know, implementing those. As far as anything built or constructed like a treatment plant or a retention pond, Stormwater Treatment Area, a periphyton STA, anything like that, earlier in those steps you can still get those BMPs implemented. You don't have to wait until the end to do that.

Q. But that's just for BMPs. If you're talking about some other technique, that doesn't happen until the end of the ten steps?

[61] A. Correct. And depending on how quickly you can do the ten steps, what effect, how quickly you've been able to identify and implement that strategy.

Q. How long are the ten steps projected to take for the C-11 West Basin?

A. The chart on the last page of the Regulatory Action Strategy is a generic chart for all the basins in the Non-ECP permit, including the C-11 West. If we are able to capture all the water quality information we need FY02, then we'd be implementing solutions as soon as we have that information, depending on each basin. Some basins there's a lot more data available than others, and areas where we have a lot of data we'll be able to put solutions into place sooner than in other basins where we don't have as much information. And you can have mountains full of information on a basin but you have to have the right kind of information so that you can track these hot spots up

into their sources and know where the problem is that you're solving.

Q. Well, that's for purposes of BMPs, right?

A. That's for purposes of anything that we're going to do. I mean why should – I mean why should we implement a massive project in any place in South Florida if we can save money on that project by [62] forcing someone who is causing a problem to clean up more of their act first, let them implement a BMP and bring it down cleaner so that the resulting water quality is less – there's less of a massive project involved? That's the whole purpose of the Non-ECP permit was to go through and look at this Regulatory Action Strategy and get the water as clean as possible before we implement these regional, expensive, time consuming and complicated projects.

Q. But that means you have to wait until you identify the hot spots, right?

A. That's right.

Q. And that also means that you may not have water of a quality sufficient to meet the needs of the environment even when you have identified the hot spots?

A. The entire intent of the program, though, is to meet the water quality standards by the year 2006 as laid out in the Everglades Forever Act and that's what we intend to do.

Q. But BMPs may not do everything?

A. That's right. And that's when I would have to turn to another technology like a periphyton Stormwater Treatment Area, if that proves to work out, or a retention



basin or Stormwater Treatment Area or [63] water treatment plant.

Q. Now, you directed me to the last page of the Regulatory Action Strategy for a schedule for what's going to happen for the C-11 Basin as it is one of the basins covered by this strategy, right?

A. (Nods).

Q. But this schedule doesn't show anything involving any construction; is that right?

A. That's correct. Any construction would be occurring between FY02 and on in the generic schedule, if you look at the dotted line there, but I've also told you that we are ahead of schedule in this basin in the earlier steps, so it is my fervent hope that whatever solutions we would implement would be earlier than what is shown on this chart.

Q. Well, this doesn't show any – it doesn't show any construction.

A. No, it doesn't.

* * *

[66] Q. How is water getting into the C-11 Canal?

A. Some of it gets there from smaller canals, [67] secondary canals that pour into it. Some water gets there from overland runoff and some water gets there from ground water flow that enters the canal – the smaller canals and then moves down the smaller canals into the main canal. And I have no idea what the percentages of those waters are.

* * *

[71] A. This map is the Western C-11 Basin.

Q. That's just one basin, right?

A. Yes.

Q. Are there sub-basins inside that?

A. Um. Yes.

Q. Okay.

A. But I don't really see them delineated here. We have identified sites to collect water quality samples that would best reflect sub-basins on the water quality monitoring strategy.

* * *

[73] Q. What basin would the Water Conservation Areas be in with respect to respective Water Conservation Areas?

A. What do you mean by what basin?

Q. This C-11 West Basin.

A. They are their own basins.

Q. Does it have a name? Is it Water Conservation Area Basin?

A. Water Conservation Area 3A, Water Conservation 3B, I would consider those like a basin.

* * *

[74] Q. Okay. Do you know about the S-13A and what that does?



A. It's a divide structure that divides the C-11 West Basin from the C-11 East Basin, but that's all I know about it.

Q. What's the direction of flow when the S-9 pump station isn't operating for the C-11?

A. Is not operating?

Q. Yeah, when it's not pumping.

A. From west to east.

* * *

[78] Q. And the water in the C-11 is added to Water Conservation Area 3A by the S-9 structure; is that right?

A. During operation of the structure, yes. Actually, operation of the pump, not the structure.

* * *

[82] Q. With respect to the 319 grant proposal, we talked a little bit earlier about the three different components. One of them was, correct me if I'm wrong, [83] spillways at lateral canals that dump into the C-11 to raise water levels and prevent them from entering the C-11.

A. It wouldn't prevent water from entering the C-11. It would increase water levels and stormwater retention in the sub-basins so it would – some of the water that would normally go into C-11, if there wasn't a gate there, would be held in the other basin, so therefore we'd be able to stop it from entering the main canal and possibly eventually the conservation area.

———

Exhibit 5

DEPOSITION OF SHARON TROST
NOVEMBER 19, 1998

Pages 5,6,10

South Florida Water Management District

REGULATORY ACTION STRATEGY

Revised 09/2/98
Work in Progress

* * *

STEP FIVE: SHIFTING MONITORING BURDENS FOR DIRECT STRUCTURES

For all direct structure where no water quality concerns are identified, and for Type 1 or Type 2 structures with identifiable water quality concerns, the District should continue water quality monitoring as previously established. However, for structures where water quality concerns are identified, the District may revise its synoptic survey data collection and analysis as follows:

A. Type 3 *direct structures with identifiable water quality concerns*

If water quality concerns are identified after the first year of monitoring for type 3 direct structures, (privately operated and maintained structures permitted by the District), the District should formally request that the permittee institute a water quality monitoring program, as appropriate, with monthly submittal of data to the District. If the existing permit does not contain a water quality monitoring provision, the District will modify the permit to make water quality monitoring a requirement.



Additionally, owners will be put on notice that dependent on outcome of sampling program, the Type 3 structure owners may be required to submit a plan for water quality compliance for their works and possibly more stringent BMP requirements.

| Type 3 Direct Structure Water Quality Monitoring | |
|---|---|
| **Lead Department** | Regulation |
| **Support Departments** | Office of Counsel |

B. Type 4 direct structures with identifiable water quality concerns

If water quality concerns are identified after the first year of monitoring for type 4 direct structures, (privately operated and maintained structures not permitted by the District), the District should contact all owners and require that they institute a water quality monitoring program as appropriate, with monthly submittal of data to the District. Consent Agreements will be prepared to require water quality monitoring of their discharges, as well as to require future permitting.

If owners will not enter into a consent agreement for water quality monitoring then a Notice of Violation (NOV) will be prepared and distributed to that owner. Additionally, owners will be put on notice that dependent on outcome of sampling program, the Type 4 structure owner may be required to submit a plan for water quality compliance for their works and possibly more stringent BMP requirements.

| Type 4 Direct Structure Water Quality Monitoring | |
|---|---|
| **Lead Department** | Regulation |
| **Support Departments** | Office of Counsel |

*A. Continue monitoring at direct structures meeting water quality standards*

Even if a direct structure is in compliance, and no additional actions are necessary, monitoring should continue and be evaluated on a routine basis. The continued monitoring will be required to ensure water quality standards are maintained in the EPA.

| Continued Monitoring for Direct Structures Meeting Water Quality Standards | |
|---|---|
| **Lead Department** | Water Resource Evaluation |
| **Support Departments** | Ecosystem Restoration |

STEP SIX: IDENTIFICATION OF UPSTREAM STRUCTURES CONTRIBUTING TO WATER QUALITY CONCERNS:

- ☐ *Identify primary structures upstream from direct structures with water quality concerns*

If the structure which discharges directly into the Everglades Protection Area is not in compliance with water quality standards, or if there are water quality concerns at that structure location, then the District will also identify the contributing area upstream of the identified direct structure.



| Identification of Upstream Structures Requiring Monitoring | |
|---|---|
| **Lead Department** | Regulation |
| **Support Departments** | Office of Counsel |

* * *

*B. Type 1 or Type 2 upstream structures with water quality concerns*

For Type 1 or Type 2 primary upstream structures with water quality concerns, the District should continue water quality monitoring as previously established, retaining responsibility. For these structures, the District should also locate additional secondary upstream structures which could be the sources of the water quality concerns, consistent with the process described in this document.

| Type 1 or Type 2 Upstream Structure Water Quality Monitoring | |
|---|---|
| **Lead Department** | Water Resource Evaluation |
| **Support Departments** | Regulation |

*C. Type 3 upstream structures with water quality concerns*

For structures of Type 3, such as privately operated and maintained structures permitted by the District, if water quality concerns are identified, the District should formally request that the permittee institute a water quality monitoring program, as appropriate, with monthly submittal of data to the District. If the existing permit does not contain a water quality monitoring provision, the

District will modify the permit to make water quality monitoring a requirement.

| Type 3 Upstream Structure Water Quality Monitoring | |
|---|---|
| **Lead Department** | Regulation |
| **Support Departments** | Office of Counsel |

*D. Type 4 upstream structures with identifiable water quality concerns*

For upstream structures of Type 4, the District should contact all owners and require that they institute a water quality monitoring program as appropriate, with monthly submittal of data to the District. Consent Agreements will be prepared to require water quality monitoring of their discharges, as well as to require future permitting.

* * *

---



**Deposition of Dr. Timothy Bechtel**
**November 23, 1998**

* * *

[8] Q. Okay. What is the next document you have brought?

A. This is an updated table of the pesticide detections at S9. It was one additional sampling of that that was conducted since – or the data was compiled since the June list that was put out.

Q. How often are these samples conducted?

A. Quarterly.

Q. Okay. I am marking the table which appears to be – correct to me if I'm wrong, Mr. Bechtel – all pesticides and flow data.

A. The flow column indicates whether the pump station was pumping or not. The pumps were on or off. So that's what it means by flow; yes or no.

* * *

[10] A. I am a senior supervising environmental scientist in the Department of Water Resource Evaluation, and my primary responsibility is to produce mandated water quality reports.

* * *

[27] A. This is considered to be the base line period –

Q. Okay.

A. – for evaluating historic flows in water quality data in the Everglades Protection Area, Everglades Agricultural

Area, et cetera. And that's what he's done. Essentially he's run the load program for that base period.

Q. Okay. And the average value for the base period is 19 parts per billion, so we must be talking about phosphorus.

A. That's what TP stands for; the total phosphorus load.

Q. And the range equals less than detection limit (4 ppb to 172 ppb). So that means that during any time frame you had no detects? In other words, anything less than 4 parts per billion up to 172 parts per billion; is that correct?

A. Yes.

Q. Okay. The next line is grab sample taken when flow was positive, N equal 100. Does that mean 100 of the samples was taken when the S9 pump station was operating?

A. That's correct. 100 out of the 196. Just about half the time there was flow.

[28] Q. Okay. And flow is positive when the S9 is pumping?

A. That's correct.

Q. Now, if the S9 is not pumping, is flow negative?

A. There is no flow. The water on the headwater side of the pump station just sits in the forebay.

Q. Is the forebay – that's the C11 side of the canal?

A. That's correct. It's on the east side of the levee.



Q. And the water in the C11 when the S9 is not pumping, does it flow east?

A. It would flow east under two conditions. If the stage in that canal was high enough and if the S13A structure gates were open, it would flow east. Typically, the flow is either stagnant or it's to the west if the pump station is operating.

Q. S13A is a structure; is that correct?

A. That's correct.

Q. It's a gated structure?

A. I believe it's a culvert with boards.

* * *

[29] Q. Is the water in the C11, does it typically have a high enough stage to flow east if the S13A were open?

A. Only if there was significant rain to raise the level in the canal. C11 west is slightly lower. It's a little bit of a lower elevation than to the east. So it was naturally a marsh a long time ago.

Q. East of the S13A. Does that typically flow east?

A. Yes, it does. That's the dividing point in that basin.

Q. And that flows to tide; is that correct?

A. Yes.

Q. If the S9 is not operating, water in the C11 typically doesn't discharge to Water Conservation Area 3A; is that correct?

A. That's correct.

* * *

[30] Q. Okay. And if the S9 is operating, then water from the C11 does discharge to Water Conservation Area 3A; is that correct?

A. That's correct.

* * *

[33] Q. What causes there to be more water, [34] such that you would want to turn on the S9 pump station?

* * *

A. There's continuous seepage coming from Conservation Area 3. Water seeps through the levee and it winds up in the borrow – I'm trying to remember the name – the borrow canals on the east side of the levee that run parallel to the levee. And those two canals from the south and from the north tend to empty into the forebay in front of the S9 pump station. That's a continuous flow because the water level in Conservation Area 3 is much higher than the water levels outside of the conservation area, so it forces the water through the levee. And when there's rain storms in the area, since the C11 west basin is a little shallower in the area, water tends to pool in that area, and when it reaches a certain height, the pump station operators are obligated to turn on the pumps to keep the area from flooding; the residential area and the few farms that are left there from flooding.

* * *



[36] Q. And then they started the pumps, and what did the water quality look like once they started the pumps?

A. Well, they typically run the pumps from 7:00 in the morning until 3:00 in the afternoon. That's when there are personnel at the pump station. So these represent different days when the number of stations, excuse me, number of samples were taken or number of pumps were running for about a week in September of 1998. The number in the second column is the number of pumps that were running.

Q. You said number of pumps that are running. There's more than one pump?

A. There's a total of three.

Q. At the S9?

A. Yes.

Q. Do you know the sizes of those pumps?

A. They're big. They are very large pumps. I do not know the total capacity for each pump.

Q. Do you know if they contribute any pollutants to the waters that they pump?

[37] A. They're basically moving water from one side of the S9 structure to the other side. They don't – to my knowledge, the pumps themselves do not contribute any pollutants.

Q. How about the – does the operation of the pumps affect the quality of the water?

* * *

THE WITNESS: There's three stations in the C11 west canal that were sampled –

* * *

[38] Q. Okay.

A. – these are the three locations where there are autosamplers set up. The first one is right next to the US 27 Highway. Further down a little bit to the west of I75 where that crosses the canal, and then down near Flamingo Road a little bit to the west of Flamingo Road are the three autosamplers. These were all samples during this particular week, and this was the pump schedule. As you go downstream, you can see that the – they also made a composite sample from these. Concentrations further down the system to the east are higher than they are in the west.

Q. Okay.

A. So when the pumps are pumping, they are moving water from east to west, so they are first picking up the seepage water that has come through the levee since the last time the pumps operated, and that's why these concentrations are relatively low. As the water starts moving from east to west, then they start picking up the higher concentration water down by I75, and eventually this water down by Flamingo Road all starts moving toward the pump station. So in a sense, depending how much water is there, how many pumps are running, how long the pumps [39] are run – and it changes every day, as you can see by all the footnotes. They are moving that water towards the pump station, and these are the concentrations that are collected at this station.

* * *



Q. Okay. So I guess what you are telling me – we were talking about how the pumps operate and how that might affect water quality. If you turn on the pumps just long enough to get the seepage water, you would have a relatively lower quality of water – I mean relatively higher quality of water with [40] respect to phosphorus than if you pumped water from the east; is that correct?

A. That's correct.

Q. So it sort of adds the eastern more polluted water to the seepage water; is that correct?

A. Over time, as the – if the pumps are running, if there's a huge storm, just the total amount of water that needs to be pumped could eventually bring in water from the eastern part of the canal.

* * *

* * *

[48] Q. But there are – there appear to be spikes that are getting close to 50 parts per billion?

A. There's a few there.

Q. In the recent history?

A. These, I believe, are up in the high 30s. [49] 37 parts.

Q. Are those during – 37 parts – can we tell if that would have been during a flow event? It would have to be in order for the autosampler –

A. It would have to be. For the autosampler to take a sample, the pumps would have to be operated.

Q. Okay. So in other words, you're getting 37 parts per billion in – at least once?

A. In that particular week, that's right, because these are set out for seven days.

Q. Okay. So that's an average for a week?

A. That's the average for that week.

Q. Okay. So you had at least one week that averaged 37 parts per billion when the pump was operating?

A. That's correct.

Q. And that means it's discharging into Water Conservation Area 3A; is that correct?

A. That's correct. That was the highest one.

* * *

[51] Q. Do you know what natural background levels are in pristine marshes in Everglades habitat, like [52] you find in Water Conservation Area 3A?

A. They're generally in the range of less than 4 parts per billion to 8 or 9 parts per billion. So 5 and 6 parts per billion would fit within. That's true in the Loxahatchee Refuge, it's true in parts of the Everglades National Park. So that's within the range. Less than 10 parts per billion to the method detection limit, which is 4 parts per billion, in that range is pristine marsh conditions.

Q. Okay. So it's fair to say that the one I was pointing at, the 5 parts per billion and the 6 parts per billion near it, is fairly characteristic of natural background?

A. I would think so.



Q. Okay. And that is lower than the 18 parts per billion we see at the S9 pump station on this particular map; is that right?

A. That's correct.

Q. And does that mean that there is more phosphorus on this map on this day at the S9 pump station than there is in the natural background?

A. That seems to indicate that.

Q. And 18 parts per billion is a – it's higher than 10 parts per billion; is that correct?

A. Yes.

* * *

[54] A. And the second thing is that we know from some of the marsh research that has been done by the South Florida Water Management District, by Florida International University and by the Duke University Wetlands Center that we start to see some effects on periphyton between 10 and 20 parts per billion phosphorus.

Q. And you are talking – when you talk about that, you are talking about vegetative changes?

A. We're talking about changes in the periphyton, which are microbial organisms and algae. So whether it's poorer or not, I'm not qualified to say. But we do see some changes occurring as the concentrations start to increase between 10 and 20 [55] parts per billion.

* * *

A. It appears that given these background concentrations of phosphorus, it appears that the S9 pump station is putting in – discharging water into Conservation Area 3A that's slightly higher than that.

Q. In phosphorus?

A. In total phosphorus.

Q. So it's putting additional phosphorus above the natural background?

[56] A. It appears to be that way, yes, assuming that this is the natural background and that the data that we have for the pump station, . . .

* * *

Q. Okay. Now, looking at Plaintiff's Exhibit 10, which we marked a little while ago, I also see that it appears that DO has 353 exceedances; is that correct?

A. That's correct.

Q. So, over 96 percent of the time DO exceeds the numeric criterion in the water quality standards. That's what this means, right?

[57] A. That's what it means.

Q. And for total zinc there is one exceedance; is that correct? Page 2.

A. Yes.



Q. For turbidity there are seven exceedances; is that correct?

A. That's correct.

Q. And that translates to 1.98 percent of the time it exceeds the criterion for turbidity; is that correct?

A. That's correct.

Q. Does the operation of the S9 pumps correspond to additional turbidity? Do they cause turbidity?

MR. MacLAUGHLIN: I'll object to whether they cause turbidity, but I don't object to him answering questions about his review of the data if there's any correlation.

THE WITNESS: Generally, the turbidity will increase when pumps are running. Not just the S9, but it's typical of most pump stations.

* * *

[58] A. Well, there's four components of a water quality standard, and these numerical criteria is one part. So the first step would be have you had an exceedance of that criteria? And in this particular case, for turbidity the answer is yes.

The second part of the water quality standard has to deal with beneficial use. Is the current beneficial use of the water impaired by this exceedance of the standard?

There's also an anti-backsliding policy that's in the water quality standards document for the State of Florida that has to be examined.

And there is one other component.

Q. What's an anti-backsliding provision?

A. Anti-backsliding provision is that a permit cannot be issued for a discharge or for any activity in a body of water that degrades the water quality standards. I think that's applicable to OFW's, official – Outstanding Florida Waters.

* * *

[64] A. I would say no. I believe S9 pump station is transferring water from one basin to another.

Q. But is it a point source of that transfer?

A. No, I don't consider it a point source, as I understand the definition of a point source.

Q. Okay. What is your definition of a point source?

A. A point source would be some type of a physical structure, whether it be a pipe or a spillway or a pump, that is taking waste water from some type of a process, whether it's an agricultural process or an industrial manufacturing process or some other type of process that generates waste waters, and then concentrates that water into a particular physical structure and discharges it to a receiving water.

Q. Let's assume that – well, back up.

Where did you get your definition of point source? You said, "based on my definition."

A. My experience in working in industry and as a consultant for many years.

* * *



[66] Q. Sure. Is it your position then that the phosphorus discharging from the S9 is not a source of pollution?

A. S9 is transferring that water from one side of the levee to the other side, so –

Q. Well, whether or not it's a transfer, I'm just asking if that's a source of pollution. We'll skip all the other definitions. Is the pollution –

A. We agreed earlier that the concentration of the phosphorus being discharged from S9 into Conservation Area 3 was at times higher than the background areas in those couple of marsh sites a few miles out into the Conservation Area.

Q. Right.

A. So in that case, yes, the S9 pump station is putting in – pumping in higher concentrations than background marsh.

* * *

[67] Q. You mentioned the term "transfer" several times. Where did you get that word from?

A. It's a word that we use here at the District. We convey and/or transfer water all over the Everglades Protection Area as well as Lake Okeechobee and going up the Kissimmee River up to the chain of lakes. We move huge volumes of water continuously.

* * *

[68] A. I would not classify C11 as a stormwater conveyance canal.

Q. How does one classify a canal as a stormwater conveyance? I mean, what characteristics makes it that, if you know?

A. I don't really know.

* * *

[72] Q. Okay. To clarify just a little bit – I think you said this, but to make sure I've got it straight – when you said S9 was an into structure, you meant that it discharged into the Everglades Protection Area?

A. That's correct.

Q. Of which Water Conservation Area 3A is part?

A. Yes.

Q. That's in the Everglades Forever Act; is that right? The designation is in the Everglades Protection Area?

A. Yes. The Everglades Forever Act focuses on the Everglades Protection Area plus the tributaries to it.

Q. You mentioned Outstanding Florida Waters earlier. Which of the waters in the Everglades Protection Area are OFW?

[73] A. Everglades National Park and the Loxahatchee National Wildlife Refuge.

* * *

Q. Is anything being done to modify the quality of the water being discharged by the S9?

A. I've heard some conversations about potentially building at least one structure to try to keep the seepage



water separate from the water of the C11 Canal east of Highway 27.

Q. Why would you want to separate seepage water from what was the water east of 27?

A. I mentioned earlier that the seepage coming through the levee from the Conservation Area 3A is a continuous seepage, and it depends on the differences in the height of the water in the Conservation Area as to the – and the height of the water in the borrow [74] canals on the outside of the levee. A lot of the water that the S9 pump station actually pumps is that seepage water. Leaks through the – seeps through the levees and flows into the borrow canals, flows back to the pump station, and it's pumped back into Conservation Area 3A. So it's a cyclical cycling thing. And except where there's large rain storms, there's no water that's being – no stormwater that's entering the system from the east unless the pumps are running. So if there was a structure there that would essentially separate the majority portion of the C11 west canal, and if there was no rain, the pumps would still have to run, but they would not be drawing that higher phosphorus water into the pumps.

Q. The higher phosphorus water being the water in the canal?

A. Yes.

Q. So the advantage would be you would be pumping lower phosphorus seepage water; it that correct?

A. That's correct.

Q. Do you know if that's actually going to happen?

A. I do not know if that is going to happen.

* * *

[79] A. I have seen – from the S9 pump station looking west into the Conservation Area you can see some cattails along the canals, but that's the closest I've been into that area.

* * *

[81] Q. So the impacts you are talking about are like the heavy cattails we talked about earlier; is that right?

A. Yes. Those would be the significantly impacted areas.

* * *

[82] A. In areas where we have had significant input of large amounts of phosphorus over a period of time, one of the first things that changes is the cattails tends to outcompete the native vegetation that was located in that area, and that's typically sawgrass and rooted floating aquatic macrophytes.

Q. Periphyton being –

A. And periphyton matter also.

Once the cattail stand dominates the area, it doesn't add oxygen to the water the way the rooted aquatic plants and the periphyton and the sawgrass do. The majority of the cattail discharges oxygen to the atmosphere because the majority of the plant is above the water. The stems of those cattail plants are very dense, they're very close together, they have a tremendous shading effect on the sunlight that gets down to the water surface within the stand so that the amount of light that's necessary for



photosynthesis, [83] if there were plants and periphyton there to observe that light to produce oxygen during the photosynthetic cycle, that light's been reduced significantly. The cattails also grow very fast, and as they grow, they shed some of their leaves. That forms a dense mat of material in the water column, and that's being partially decomposed by bacteria. The bacteria use up what remaining oxygen is in the water so that most of the time there's very, very little oxygen in the water. Sometimes it will be zero for 15, 18, 20 hours a day. Even though the sun is out and everybody is happy, inside the cattail stand it's anaerobic. You won't find any fish there, you won't find any aquatic bugs that fish feed on, and it's a pretty nasty place.

Q. Sounds dreadful. So you are talking about a relative dense cattail stand?

A. A monoculture of cattails.

* * *

[85] Q. Are there any other issues, in your opinion, relating to water quality other that than phosphorus and DO in the vicinity of the S9?

A. I think we looked at the exceedance table earlier, and there was 7 turbidity exceedances that have been measured over the last 20 years. I consider that to be a pretty minor – I don't see that – any great concern about that. We had one zinc detection or one zinc exceeding, excuse me, and we have had no conductivity problems there.

Q. There are a couple of other constituents that have had exceedances, aren't there? Unionized [86] ammonia? That's correct, isn't it?

A. Yeah, that was two times out of 252 samples that it was higher than the criteria.

* * *

[87] Q. Can you explain the table to me and what it means? It appears that there have been detects of certain pesticides.

A. Uh-huh.

Q. Atrazine is one; is that right?

A. Reading across the top of the table, there's one, two, three, four, five, six, seven, eight – there's been nine different pesticides detected at S9 from 1992 through February, 1998.

* * *

[88] Q. Okay. Now it looks like with ametryn – correct me if I'm wrong, but this means you have four detects?

A. That's correct.

Q. Since 1992?

A. Uh-huh.

Q. But you only test quarterly?

A. Quarterly. That's correct.

Q. Okay. So that's four out of however many [89] quarters there are since 1992?

A. 29. Total of 29 samples.

Q. So, four out of 29 samples had a detect?



A. Yes.

Q. Then atrazine –

A. 16 out of 29.

Q. 16 out of 29. That's more than half, right.

A. Yes.

Q. Okay. And then it looks like two of – okay, I don't know how to say this one.

A. Diuron. D-i-u-r-o-n.

Q. I'm usually pretty good with these but – and hexazinone, seven?

A. That particular sampling didn't start until this line. That's why these are NA. So that sampling program for that one and the next one there, norflurazon, they started in December of 1994.

Q. So that means for that particular constituent it was 7 out of 14.

A. That's correct.

Q. That's about half of the time, too?

A. Yeah.

Q. Now in my personal experience, that's a fairly significant number of detects; isn't that correct?

[90] A. 50 percent?

Q. Yeah.

A. Oh, certainly.

* * *

[92] A. You could have several pesticides in water column, each one individually being less than a [93] published toxic value, but they could have a synergistic effect. Again, this is you know, hypothesis. But they could have a synergistic effect, which could be toxic to a particular organism.

* * *

[102] Q. Do you have any knowledge about what the various basins and sub-basins are in the vicinity in and around the vicinity of the S9?

A. The predominant basin C11 west?

Q. Okay. Do you know what the others are?

A. No.

Q. Do you know the boundaries of the C11 west?

A. The eastern boundary is the S13A structure, or is it – it's the one we mentioned earlier this morning. S13A.

Q. And what is the –

[103] A. Western boundary would be – I guess it would be the levee of the Conservation Area.

Q. Okay. So is the S9 on the levee or in the levee?

A. The pump station is in the levee

Q. So in other words, the Water Conservation Area is in some other basin?

A. Yes.

* * *



[111] Q. We're looking at Plaintiff's Exhibit 11 at 2-55, and it's Table 2-12.

A. These are all of the structures that discharge into the EPA.

Q. Okay. I see one of them, obviously, is S9.

A. These are the loads for water year 1997, and then this was the ranking of those structures by magnitude. Highest being number one, lowest being number 21.

Q. Highest, the largest amount, largest load?

A. Highest load yes. Greatest load.

Q. So the S9 is the number 7 on the list of 21.

A. For total phosphorus. And it was number 5 for total nitrogen.

Q. So does this mean – looking at the second column on this table 2-12, does this mean that the S9 had 5.4 metric tons of phosphorus discharged through it during water year 1997?

A. That's correct.

Q. What is water year 1997?

A. In this report it represented October 1st, 1996 through September 30th, 1997.

* * *

[113] Q. The document I'm looking at is entitled Draft Water Quality Aspects of the Proposed East Coast Buffer Strip, Evaluation of the C11 West Basin by William W. Walker, Junior, Ph.D., dated January 31st, 1997. How

would this document assist you in expressing opinions about the quality of the water around the S9?

A. Dr. Walker had taken historic data and did an analysis in that particular report and then started looking at what kinds of treatment would be necessary to meet certain phosphorus criteria. (Plaintiff Exhibit No. 12 was marked for identification.)

* * *

[115] Q. What are the water preserve study goals?

A. Well, I have not been involved in that project, but basically they were looking for these buffer zones outside of the Everglades Protection Area but adjacent to the levees where there were a lot of wetlands that were still intact as wetlands and some that were being marginally infringed upon, and wanted to have these preserve areas, buffer areas, created to stop the development from coming right up to the levees, as has happened in part of Broward County. So it's a dual purpose. To keep some wetlands functional [116] as wetlands as buffer zones between suburban developments to the west in each of the counties of Palm Beach, Broward and Dade County as well as be able to in selected basins treat water quality or treat water that has quality problems and potentially use that either for feeding back into the system or for backpumping into the Everglades Protection Area.

Q. Does this have any kind of a direct relationship to the C11 west basin?

A. C11 west is considered to be one of those basins that is within the water preserve area.



Q. Do you have any expertise to talk about the water preserve area and what it does?

A. No, I have not been involved in that project.

* * *

[118] Q. In looking at what was marked as Plaintiff's Exhibit 12 on page 19, that's the William Walker document, there's a section called 6.0, Conclusions, and number 2 under that section indicates, "Historical monitoring data from S9 reveals strong positive correlation between phosphorus concentration and daily flow. Concentrations range from less than 20 parts per billion at low flows to greater than 100 parts per billion" – it should be; it's a typo there – "at high flows.

* * *

[119] A. The other thing that happened is that the land use in the C11 west basin was changing very, very rapidly in the 1990's, what had been farms and pastures were now major suburban developments, and as part of those developments there were lakes and canal systems that had to be constructed within the development to retain certain frequency of storm water flows. I do not know whether it was a one-in-ten-year return storm or a one-in-seven, but they were designed to hold a certain volume of rain water.

In the past that water could hit the ground, [120] the pastures, and run through the ditches that drained those areas directly into the C11 west canal. Once the suburban developments were completed, those became essentially retention systems. Detention systems is the correct term. Detention systems. And the water was allowed to rise to certain points. And then they would discharge or pump it

into the C11 Canal. So during that retention or detention period there was opportunity for particulates to settle. And that was part of the treatment that was actually ongoing. And the quality of the water improved dramatically from the early to mid '90s, and it was nothing like the data that Walker had used in this report.

* * *

[121] A. You can see that the concentrations are all less than 40 parts per billion. So in the two, comparing the two ten-year periods, there's a big difference. And that is what I attribute to the changes in the land use pattern. The sources for that level of total phosphorus spikes are now isolated down in the eastern part of the C111 basin, and that water does – what used to be taken directly into the pump station is now being retained in those huge suburban developments with all of the lakes in the canal system. So the quality of the water that we're seeing, this is the data with the auto samplers, is generally under 40 parts per billion. And that was my major contention; that he wasn't recognizing in how he presented the data – we had a major shift in land use that was improving essentially the runoff [122] characteristics in the western part of that basin. And again, it's the same. These were the same high points that we looked at this morning.

* * *

[125] A. Well, actually the additional development will eliminate some of the still existing uncontrolled runoffs from the open; the pasture. There's still a [126] few pastures out there, and I'm not sure if there's any farms left. It's been a couple of years since I have been down



there. But that open land was rapidly being developed into these large suburban developments.

* * *

[132] A. The regulatory action program will go – it is my guess that they will go upstream in the C11 Canal and look at the additional discharges that are coming in from both the south and the north sides of that canal as part of their mission to identify all the sources to the canal.

* * *

[141] Q. Now, you mentioned when you answered Mr. McLaughlin's questions that there was no numeric standard set yet for phosphorus; is that correct?

A. That's correct.

Q. There is, however, a default numeric [142] standard of 10 parts per billion if rule making hasn't been instituted by a date certain in the future; isn't that also correct?

A. That is true.

* * *

**Deposition of Ken Ammon**
**December 2, 1998**

* * *

[53] Q. How about – you're the hydrologist. What kind of basins are there in the hydrology context?

A. In hydrology they are usually referred to as drainage basins.

Q. How many drainage basins are there in the general vicinity of those three structures?

A. I would consider the S-11 Basin – basins, has two. There's an S-11 East Basin and an S-11 West basin, primarily divided at roughly the coastal ridge location. I think there's a water control structure that divides them also. The East Basin flows to the ocean and the West Basin is back pumped.

Q. What back pumps that basin?

A. Runoff is collected on the site and off different various sites in the basin and eventually, if it rains enough, it runs off into a canal known as C-11 Canal. The western terminus of that canal is a pump station called S-9 and when the water elevation reaches a certain point, in order to protect the surrounding properties and adjacent properties from flooding, the pump station turns on, delivers that water from the canal to our conservation areas.

* * *

[58] Q. Once the S-9 was constructed. We'll use that time frame. After that the water wouldn't have gone to the Water Conservation Area?



A. The only water that may have gone there without turning on the pump may have been some seepage associated with higher water levels on the east versus the west.

* * *

[62] Q. In terms of canal water on the surface, would the canal water go to the east as surface water, not passing into the ground, without pumping the S-9 –

A. No.

Q. – pump station? I'm sorry. No is the answer?

A. Correct.

Q. You set a very interesting hypothetical for me. Now, isn't it true that when you turn on the S-9 pump station water from the C-11 Canal discharges into Water Conservation 3A?

A. That's correct.

Q. Does it add water that wasn't formerly in Water Conservation Area 3A?

MS. SOLE-CALAS: Object to form of the question.

BY MS. CARROLL:

Q. Does it add water from somewhere other than Water Conservation Area 3A?

A. Yes.

* * *

[65] THE WITNESS: My understanding is that the South Florida Water Management District has applied

for NPDES permits for certain Stormwater Treatment Areas that are associated with the Everglades Construction Project.

* * *

[74] Q. What happens to the water in the C11 Canal if you don't turn on the S-9 pump station?

A. I would say it would sit there in the canal.

* * *

[113] Q. What basin is Water Conservation Area 3A in?

* * *

THE WITNESS: Um, I wouldn't say that the District has an actual designation as a drainage basin. It does have Water Conservation Area 3A designation that you might use interchangeably with the basin. I would say 3A and Basin 3A might be the same interchangeably.

* * *

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**Deposition of Bradley G. Waller**
**December 8, 1998**

* * *

[9] Q. Have you qualified as an expert in court or in administrative hearings?

A. Yes.

Q. What areas, can you tell me?

A. Hydrology, water management, and I think on a couple of cases it was in water quality, especially precipitation chemistry, where I had written a paper summarizing some historical information.

* * *

[13] A. I was a project leader on that project in the western C-11 basin, which is – which has structures S-9, S-13A and S-13.

Basically we didn't look at S-13, but between S-13 and S-9 and that report was this one right here, resulted in this report. That was funded by the Water Management District.

And then –

Q. This report you just handed me is entitled Effects of Land Use and Water Management on Water Quality in the Western New River Canal Basin, Southeastern Florida.

* * *

[14] Q. Okay, that's entitled Southwest Broward [15] County Study, 1982?

A. Yes.

* * *

[33] A. It has a section on S-9 in there, looking at the different time-series data, basically started – you started the collection after the USGS finished, right at '78. Broward took over their data collection, Water Management took over their data collection. That's in there.

And these are the documents in support of the Everglades Forever Act.

* * *

[36] A. Okay, I acquired the water-level and discharge data for S-9 from the Water Management District data base called DB Hydro.

I summarized those data into illustrations, one for water level. I plotted the number of occurrences of water-level excedences greater than 4.25 feet above sea level for the period of record.

It shows that since 1970 there has been very few occurrences of a water level rising in its entire basin. I think the greatest was in '93, maybe nine or ten times. Many years after 1970 were zero, which means the water level did not go above 4.25 feet.

* * *

A. As [37] development proceeded, more and more water management was required to keep the water levels low and to prevent flooding.



* * *

[40] Q. – it's entitled Effects of Land Use and Water Management on Water Quality in the Western Basin, South New River Canal, Southeast Florida.

* * *

[41] Q. Okay, on page 1 in the abstract section, last sentence in the first paragraph says that most of the recharge to canals is by induced groundwater inflow and seepage.

A. Yes.

* * *

Q. I guess I should introduce it by saying the paragraph is talking about the South New River Canal basin between water control structures S-9 and S-13A.

* * *

A. Yes, seepage implies let's say a more passive movement of groundwater from the conservation areas or from areas where there's higher water level to areas where there's lower water levels. That's seepage.

Induced groundwater inflow means there's something going on, the induced groundwater flow is when the water table is lowered by either [42] gravity discharge to the east, which is minimal, or pumping to the west, or by – there are a bunch of secondary pumps and control structures also that, in the basin at this time that, as they lower the head in the canal, it induces groundwater flow into the sides of the canal bank or the – or – I guess not really canal bank, canal sides.

* * *

[46] A. The South New River Canal drained straight to the east through the town of Davie, which had a lock and dam that was not very functional, but that drained the water in that area.

And then the remaining of the water drained through the Miami Canal into the Miami River and out into Biscayne Bay.

* * *

[48] Q. So the area of the C-11 west basin before 1913 was basically part of the Everglades, is that correct?

A. Yeah, it was part of the Everglades, it was the eastern edge of the Everglades.

Q. What was the surface hydrology in this area of the Everglades, do you know, the directional flow of the - -

MS. CARROLL: Objection, this area?

MR. MacLAUGHLIN: Of the C-11 west basin, prior to 1913.

THE WITNESS: Prior to 1913 it probably had flow in both directions. You had finger channels that went through the Atlantic coastal region, overflowed to the ocean, you had those. [49] You also had a mounding effect on the Atlantic coastal ridge which pushed water in both directions off of here, so this – you know, again, when you're out in the Everglades you cannot detect visible flow, but the flow, probably to the south-southwest and southwest, I would say it went pretty much all directions, just by filling up into, you know, coming from the north, your highest hydrologic head up there, your slope of land, all



pushing this down, if the water was high enough it overflowed into the east; otherwise, just maintained in the giant Everglades basin and dried up.

And basically, the hydro periods, or where there was standing surface water, would shrink based on the surface topography.

Q. From what I understand, the overall flow from the Everglades is to the south, is that correct?

A. To the south and then, depending on where you are, the Taylor slough goes to the south, Shark River slough goes to the southwest.

[50] But I try to explain it to people, if you think of the Everglades as a large plate with little grooves on the side and some of the groves are wide, some are very small, you're filling it up, it's going almost all directions under heavy, you know, high rainfall conditions.

Q. So the South New River Canal was dredged in 1913?

A. Mm-hmm.

Q. How far was it dredged to the west?

A. It was dredged to the confluence of the Miami Canal, which would be about right here.

Q. Approximately how far west of the existing S-9 pump station would that be?

A. One, two, three, four, about seven or eight miles I would say.

Yeah, I think I stated it, I think it cut off the western eight miles of the canal, I think that's in that report.

* * *

[55] A. There's not a lot of time to establish any kind of a plant community because the water is being pulled virtually every day at S-9 and inducing the groundwater flow. Groundwater is always low in dissolved oxygen, and it's just being induced, flow, to be pumped at S-9, so I'm sure it's about the same.

* * *

[64] Q. Let's go to our situation here, the hydraulic head in the Water Conservation Area is above the C-11 west basin, is that correct?

A. Yes.

Q. Approximately how much higher?

A. I would say, just general observation out here, you're probably talking about ten and a half feet, ten feet, something like that, of the water table.

Again, some years higher, lower in others, but let's call it ten feet. And on this side it's four feet generally.

[65] The pump is made, it's designed to pump with about a 10-foot head, which would mean during a pumping session the canal water declines from four feet maybe down to zero, so it's still within the range of its design, let's say.

Q. Okay, let's turn off the pumps again, stop the pumps.

A. Okay.



Q. We still have this head in the Water Conservation Area?

A. Right, from both sides.

Q. Would there still not be some exchange of groundwater in the C-11 canal because of this –

MS CARROLL: Objection, are you under current conditions or historic conditions?

MR. MacLAUGHLIN: In current conditions.

THE WITNESS: Current conditions, we shut the whole basin off, –

MR. MacLAUGHLIN: Yes.

THE WITNESS: So your flow is going, the northwest corner of the basin being discussed, C11, to the southwest corner, which – I mean southeast corner, which is down here, and I think this is pointed out [66] in this report and also in the report done by the Water Management District: that when everything is shut off, it changes the water management regime here and you have a flow from northwest to southeast, it would be passing through the South New River Canal.

* * *

[68] Q. . . . it says that "more water will have to be backpumped westward into Conservation Area 3 at S-9 to prevent flooding in the basin if it is developed further."

Of course understanding this report was written in 1978, why did you say that?

A. Well, two things: When we did this study the basin was 85-percent undeveloped, that was our calculation. We knew from discussions with Water Management District in Broward County Planning that they were looking at probably, I think something like a ten-fold increase in people living in the basin, and to do that we knew that there were gradients away from C-11 canal, so if you're going to develop farther away from the canal you'll have to have more and more canals connecting back into there to be able to convey water.

So instead of having, every time a pumping session let's say goes down to two feet here but five and a half here, as you develop this it's so well – connected that this whole area will become more like the canal, you actually have to move, well, I would say now you'd have to move almost all the water out of the basin back to your basin divides to maintain the right type of flood [69] protection that they would require.

You do your calculations based on average water conditions, and the closer you are to the canal the more drained it's going to be, so as they develop, I think most of this out here, housing developments now all interconnected with surface water systems, and to maintain the flood protection they have to lower the entire water table, not just like this, but like this, so that you have that extra bit on each of the edges that have to be drained off.

Q. Okay –

A. That's the way we looked at it.

Q. So basically some of the areas further away from the main C-11 canal –

A. They really weren't drained.



Q. Okay –

A. I mean, back when we did the study there was no way to drain the water, it was just basically filling up and evaporating.

Q. Then the second sentence says that: The excess water could be released eastward, but to do so would reduce the water available for aquifer recharge and for prevention of salt – water encroachment." [70] So basically are you saying the pumping of S-9 to the west is beneficial?

A. From a water – quantity point of view, as we develop further, we try to keep – you know, you look at Corps study, you try to keep as much water – what's the term? – higher in the system.

For water – management purposes, I mean as we need more and more water for whatever purposes, we're going to have to look at better ways to manage it, to keep water higher in the system so it's usable for other things besides being dumped to the ocean.

I think this has evolved, this concept has just been evolving over the last few years, and when we didn't expect this many people or this much drainage or this much restoration.

* * *

[74] Q. The question I had was you said the historic flow in the New South River Canal was from the Everglades eastward to the ocean. When you said historic, what did you mean by that? What period of history?

A. Well, from the initial construction in 1913 until basically the closure of the Conservation Areas, which

would include the north-south levy and the pump stations and structures.

Q. I'm not sure I understood that. The historic flow of the water in New South River Canal was from the Everglades eastward to the ocean, when you said it –

A. From the Everglades area right in here, it flowed eastward, essentially past the lock and dam into the tidal where it was connected to the [75] south fork of the New River.

* * *

[77] Q. Okay, and the S-9 structure basically is a structure right in that canal, is that –

A. Yeah, it is – it was placed in the canal, where the historic canal was, a channel.

Q. And then the next statement in that paragraph is: "Thus, the direction of flow of water in the western reach of the South New River Canal was reversed from historic natural conditions."

Again I just, when you said it was reversed from historic natural conditions, you mean natural – what do you mean by natural?

A. Well, natural I think in this context is you're assuming the South New River Canal was already in place.

Q. Okay.

A. Natural is a very difficult term that people try to deal with down here.



Q. You don't mean natural as far as the natural Everglades prior to any construction?

A. No, it's once the South New River Canal was dredged.

* * *

[84] Q. Okay, in number 8 you state that: Protection of the Water Conservation Area 3A environment from increased pumpage at S-9 is of utmost concern. Water Conservation Area 3A is both a navigable water of the United States, as federal statutes contemplate those terms, and an outstanding Florida water."

Is the C-11 canal a navigable water of the United States?

A. The C-11, yes, from what I understand of it.

* * *

[89] Q. So again, if you turned off the pumps there would still be a flow to the east apparently –

A. There would be, yeah, your gradient would be this way.

* * *

[94] THE WITNESS: Yeah, am I going to say the pump adds anything? No.

Am I going to state there are chemicals on this side and there are chemicals on that [95] side and this is the load of those chemicals? I may testify as to that.

Or I may just testify as to the volume of water moving through the pump and recorded.

* * *

[100] Q. Excuse me, 67 canal – that there are gaps being placed in the – in that canal to allow water to flow down into Water Conservation Area 3B.

A. Right.

Q. And that would reach to Everglades National Park?

A. Right.

Q. Do you know where those gaps are? Can you point them out on this map?

A. Yeah, they're about, there's one in existence right now that I know of, they're right along here, along Levy 67.

Q. And –

A. I don't know the exact placement, but there are going to be approximately three from what I've seen from the – these would be coming from the general design memorandum of modified water deliveries to Everglades National Park.

* * *

[101] A. Now the proposal is to put gaps in these levies which, I think there's going to be [102] channels going between, just to ease the flow, and there's going to be structures there that actually blocks the water and forces a higher head to the upstream side, which will re-wet Water Conservation Area 3B.

Then the historic center of flow was right there between these two structures, A and B, on the Tamiami



Trail, then it would bring this water back, this canal and levy would be gone, and the flow would again be as, quote, natural historic as we can recreate.

* * *

[108] Q. Would you call the canals from the S-9 pump station down to the gaps and then to Everglades National Park a direct connection to Everglades National Park?

A. I think that was one of the biggest complaints of the park with the modified water deliveries, is it worked as it was designed, it moved water very rapidly to the S-12 structures.

It's a good delivery channel, it's wide, it's deep, and when we did some of the chemical work in Everglades National Park we noticed that after this went in there was a gradual increase in chlorides, potassium, some of the inorganic ions, and eventually that increase, that change in water quality extended all the way to 10,000 islands.

[109] Q. Okay, so but putting the gaps in there, would that seem like that would actually interrupt that direct connection, is that correct?

A. Right, that's what they're designed to – well, they're designed to do two things: interrupt that direct connection, and also to shunt the water to the east to the historic center of the Shark River Slough, which they know is over there, what you would call Coopertown and Everglades Safari. That is the historic center of the slough, over in that area.

* * *

[110] Q. Based on your expertise would you say that the waters in the canal on the east side of S-9 are a distinct water body from the waters on the west side of the canal?

A. In terms of chemistry? Water level? Source?

Q. So it makes a difference as to how you distinguish, is that what you're saying?

A. Yeah, how are you distinguishing in terms of water levels are different, in terms of chemistry?

One is basically an urban basin; the other one is a marsh and interior conservation area.

* * *

[111] Q. Does the pumping at the S-9 structure divert the flow of water in the South New River [112] Canal?

* * *

THE WITNESS: Diverts it from what? Diverts it from direction of flow?

MR. MACLAUGHLIN: Mm-hmm.

THE WITNESS: From historical direction of flow?

MR. MACLAUGHLIN: Yes.

THE WITNESS: Yes, it does.

Let me just add one thing on that, the, Water Management District and the USGS designate upstream and downstream different at these structures. USGS always



designates it as what would flow naturally, which is toward the ocean.

And your headwater and tail – water designations are opposite that: you consider the headwater on the east side and the tail water on the west side.

* * *

[114] Q. Is there a hydrological connection between the water conservation and the C-11 canal?

A. Hydrological connection?

Q. Yes.

A. Via seepage? Yes.

Q. There is, okay.

A. Seepage is not intermittent, it's a continuous phenomena.

* * *

[116] Q. Okay, if we removed – and excuse me for being repetitive here, I'm trying to wrap up before we take a look at the documents – but if we remove the S-9 pump station and the other structures in the C-11 canal, I believe it was your – which way would the water flow?

MS. CARROLL: Objection, under what conditions? The form is not clear.

BY MR. MacLAUGHLIN:

Q. Which way generally would the water flow?

A. If you just removed them, left the levies in, the water would flow in the east.

Q. Would the levels in the Water Conservation Area eventually lower?

A. Yes.

Q. How much, do you have any idea?

A. Just uncontrolled discharge?

Q. Mm-hmm.

A. Just guessing, maybe depending on the location, three or four feet.

Q. Would that be beneficial?

[117] A. To?

MS. CARROLL: Objection, form

BY MR. MacLAUGHLIN:

Q. Beneficial to the Water Conservation Area as far as –

A. From a hydrologic point of view?

Q. Yes.

A. Water-management point of view?

Q. From a water-management point of view.

A. No, it would not be beneficial.

Q. Why not?

A. Because you would be draining stored water that is used not only by the urban users, but for in the long run the restoration of the remaining Everglades. You would be going back to the uncontrolled drainage of the 1940s.



* * *

[128] Q. Okay, there was quite a lot of discussion about the S-9 pump station. Is it fair to say that the S-9 backpumps into the Everglades?

A. Yes, that's a classic backpumping station.

Q. What's that mean, to backpump?

A. Backpump means you're pumping against a gradient or you're pumping against what would flow naturally the other direction, or another direction.

* * *

[129] A. So historic flow conditions in the South New River Canal would have been from the west or the heart of the Everglades out to the coast, tying into the tidal canals.

* * *

Q. Is it correct to say that the C-11 west basin is a separate basin from the Water Conservation Areas?

A. It's, from a water-management point of view, it's a separate basin, because each basin has certain engineering design characteristics so they can size canals, water-control structure, pumps properly, so you don't have a lot of interconnection between basins.

And they have, their surface water management people do a lot of work, you know, [130] designating these basins and making sure that structures within those basins are functional based on the interconnections.

But for the most part they try to maintain separate basins, even though we deal with the water table situation down here.

Q. Is there – strike that.

Is there hydrologic connection in a large area in South Florida, or are they – is hydrologic connection in fairly small areas?

MS. SOLE-CALAS: Objection, form.

MR. MACLAUGHLIN: Sorry, I wasn't listening.

MS. CARROLL: I think he can answer the question.

MR. MACLAUGHLIN: Go ahead, answer it.

THE WITNESS: Throughout most of South Florida there is a continuous water connection. We don't have classic basin divides and watersheds and everything.

There are some areas where the water level is higher, you have seepage from one side to the other, but in terms of a continuous water surface, it's pretty much throughout South Florida, even though we [131] designate basins and artificially divide up watersheds.

* * *

Q, Mr. Waller, you were just asked about separate basins, and unfortunately I didn't catch the basins that you were asked about. The C-11 west basin, what was the other basin –

A. Well, there are just other basins that are designated by the Water Management District, by [132] the surface water management people, and a whole series of reports have been put out by Jim Lane, Cooper & Lane, they're familiar to me.



And because these basins are used to, you know, as Water Management District permits any type of use, secondary canals, structures, weirs, culverts, they have to know what basin they're going to be in, what is the primary control of the water levels in that basin, to make sure there's not a lot cross-connections or overloading one particular basin in favor of another.

So that's why these are designated, even though they're artificial, let's say, they're still designated as basins, for permitting purposes more than anything else.

Q. There still can be hydrological connections between these various basins?

A. Yes.

* * *

**Deposition of Tommy B. Strowd, Jr.**
**December 14, 1998**

* * *

[5] A. I'm the Director of the Operations Division.

Q. And what are your responsibilities as Director of Operations?

A. I'm responsible for the administration of the operations division at the District, and the primary purpose of that division is to control water movement to meet the mission objectives of the agency.

* * *

[8] A. This is the excerpt from the structure book for the S-9 structure. It says: "The purpose of the structure is to pump surplus water into the conservation area 3 via the South New River Canal from the Davie agricultural area west of control structure 13-A, and to pump seepage under the levees 33 and 37 back into conservation area 3-A, at a rate of three quarters of an inch per day from the tributary drainage area, plus approximately the same quantity of seepage."

* * *

[10] A. In a general sense, I would say the C-11 basin would include both sub-basins, the C-11 west and the C-11 east. When we talk about the C-11 west basin, I interpret that to mean just the western sub-basin of the overall C-11 canal.

* * *

[11] A. Yes. In general. I mean, the specifics of the design were based on a particular event that the Corps



used, a particular storm event that the Corps used in the design of the system, that it could pump three quarters of an inch a day, and an equal amount of seepage. When you don't have significant rain in the basin, you obviously pump less runoff, and so therefore, in an average it operates that way, but at any specific time, it can vary somewhat.

Q. Does the Corps set a rain schedule for the S-9?

A. Only in a general sense. They established a level in the C-11 canal above which pumping should generally be initiated, and they set a lower level at which point pumping should be terminated, or shouldn't go below.

Q. What are those levels?

A. The upper level is 4 feet NGVD, and the lower level is zero NGVD.

* * *

[12] Q. So just to put it in laymen's terms for me, does this mean when the canal gets to 4 feet above sea level or above, then you run the S-9 pump station, and then when it returns to sea level, you stop running the pump station?

A. In general terms, yes. But for the specifics of the elevation, yes, you're correct. There are times, because of just operational reasons, we operate the pumps at different levels. But that's generally correct, the statement you made.

Q. When would you operate them differently than this numeric trigger that I describe?

A. Well, a lot of times, in advance of storm events, we will draw down the canal in preparation for that storm event, even if we are below 4 feet NGVD, to provide some additional capacity in the canal.

Q. How far do you draw it down?

A. Typically around 1 foot NGVD. But it could vary, dependent upon the severity of the storm [13] that we see and the time of year.

* * *

Q. And is it is correct to say that the S-9 pump station discharges into water conservation area 3-A?

A. In a general sense, yes.

Q. Could you elaborate, if there are specifics?

A. As far as specifics go, I mean, it actually discharges into the excavated area that is the South New River Canal, which extends west onto the Miami Canal. However, when water levels are above the bank of that canal, it's essentially a continuous water body, and so it's probably more accurate to say it discharges into 3-A.

* * *

[14] Q. What happens to the water when it's discharged from the S-9?

A. That really depends upon the different hydrologic conditions in that basin as to where water may go.

Q. Can you describe for me the different types of scenarios we can see there?

[15] A. Sure. It's complicated by the levee systems that's there, but generally speaking, when water levels are



above – let's start with when water levels are below the canal banks. Then the water generally stays confined to the canal system. So some could move to the west, toward the Miami Canal, some could move south down the L-67A borrow canal. And depending upon general water levels, water might even go north up the L-68A borrow canal.

Q. It can go north or south on the L-67A.

A. It could. Well, it could go south on L-67A, or go north up the L-68A, excuse me. And that would be a situation that would be generally characterized by very dry conditions in the conservation area.

If the conditions were wet, as I mentioned earlier, where you've got the area sort of behaving as a contiguous water area, water would tend to sort of move out into areas of the marsh. However, the existing canal network that I've just referenced is sort of the path of least resistance.

So while you would have water moving into the marsh to some degree, you'd still have a significant quantity of water moving down the canal systems, possibly in a fashion that I enumerated [16] earlier for a dry condition.

Q. So you're saying even when the water is above the canal bank, you are going to see a lot of the water travelling the same way?

A. Right. Right.

Q. Except that some of it will go directly into water conservation 3-A?

A. Right, into the marsh.

Q. The water that goes into the L-67A and heads south, where is the next destination of that water?

A. Again, that sort of depends on hydrologic conditions and what the specific gate operations are for structures that are along that path. But the first point that it could deviate out of the L-67A canal would be at the S-151 structure. That's a structure that's located in the Miami Canal at the intersection of L-67A. So if 151 was open, water from L-67A could get into the Miami Canal, and move sort of south – excuse me, in a southeasterly direction down the Miami Canal.

If that structure was not open, it was closed, then water would probably continue then to move south in the L67-A borrow canal toward Tamiami Canal. And at that point, there are a number of [17] directions it could go. If you want me to enumerate those, I can.

Q. Please do.

A. Again, it depends on which structures are open or closed, but if S-333 was open, water could go in a southeasterly direction into the L-29 borrow canal, which would then allow it to go under Tamiami Trail and into North East Sharks Slough.

It also has the option of going west, depending on the configuration of 12-D. it's possible it could go west into upstream of the S-12 and then go under Tamiami Trial that way. And I believe there may be some other configurations, I'm just not able to recall specifically this configuration. I'd have to look at that in detail to be able to tell you every possible angle.

* * *



[18] Q. Okay. How about the water coming down the L-67A, hasn't the Corps started the process of putting the gaps in the extension?

A. Yes. That is correct. I forgot about that. They had last year opened the gap in L-67A, about a thousand feet wide, which would allow water in the L-67A borrow canal, when it's above the normal ground level, to flow southeasterly into conservation are 3-B.

Q. Right.

A. And that was something recently done, last year.

Q. Isn't it correct that they are going to add additional gaps to L-67A?

[19] A. It's my understanding it is part of the modified water deliveries plan that the Corps presently has authorized. There is provisions for some additional gaps. I'm not sure of the number, of specifies, but that's my understanding.

Q. Okay.

A. And there may be others that are proposed, or changes to that that may be proposed as part of the Restudy.

MS. CARROLL: Just for the record, I'm not going to attach the District Structure Map, it's something that we're all very familiar with, so I don't think it's necessary, but I'm going to identify it for the record. It's the South Florida Water Management District Structure and Canal Locations Map, revised 9/29/93. Actually, let's go off the record.

* * *

MS. CARROLL: For the record, we have modified that decision about documents, and instead have marked the structure and canal locations map that we have been discussing as Plaintiff's Exhibit 9 for deposition purposes.

* * *

[20] Q. Now, water conservation area 3-B is approximately where I'm gesturing, sort of south and east of the L-67A and L-67C; is that correct?

A. Yes, that's correct.

Q. in that water conservation area 3-B, does it generally travel south?

A. Yes, it does. I believe the topography is more southeasterly, it slopes down as you move to the southeast. But because of the L-30 levee, once it reaches that point, then it will tend to move south until it reaches the L-29 levee which I mentioned earlier.

Q. Right. And the L-30 levee sort of runs north and south, so it prevents it coming to the coast?

A. Right.

* * *

[21] Q. Okay. Is it fair to say that water conservation are 3-B is Everglades?

* * *

THE WITNESS: I would clarify it by characterizing it as the rim of the Everglades. It's not Everglades in



its natural condition, because of the levees and the canals that we talked about.

BY MS CARROLL:

Q. Okay. It is part of Everglades Protection Area; isn't that right?

A. Yes.

* * *

[24] A. The design of the Eastern C-11 canal and the S-13 structure which is further to the east –the design of 13 and the canal were just to handle the runoff from the C-11 east basin. They don't have the capacities to additionally handle the runoff or the seepage from the C-11 west basin. So this divide structure was needed to separate those two basins, so that water in the C-11 east basin could move east through S-13, water in the C-11 west basin could move west through S-9.

Q. Now, looking at the C-11 east basin, is the S-13 the only way that water exits from the east basin C-11 canal, that portion of it?

A. Yes. It's possible it could go west, but that would be a very rare situation.

Q. Is the S-13 A ever opened?

A. Yes.

[25] Q. And what happens when the S-13A is opened?

A. Typically, S-13A is opened when there is heavy rainfall in the basin, in the western basin, and the C-11 Eastern canal has additional capacity. At that point, 13-A

can be opened and some volume of water can be let from the C-11 west basin east, and it would discharge to tide through S-13.

A. So it's fair to say that the C-11, generally the water in C-11 generally discharges to the east if the S-9 isn't operating?

MR. MACLAUGHLIN: If it is not?

BY MS. CARROLL:

Q. If it is not operating and if the S-13A is opened.

A. Could you clarify that or repeat that for me?

Q. Sure. I'll repeat it. If the S-9 isn't operating, and the S-13A is opened, is it fair to say that the water in the C-11 canal generally discharges east?

A. I would say under that specific scenario, it would discharge east. We don't generally do that specific operation, so I guess I want to separate the hypothetical from what's generally done.

Q. Right.

[26] A. But for that specific example, where S-9 would not be operating and S-13A would be opened, presume that S-13 is operable, then water would tend to move to the east.

Q. I'm not sure how to ask this question but I'm going to try, and maybe you'll help. Is it fair to say that absent – strike that. Let me back up a little bit

What kind of structure is the S-13?



A. The S-13 is combination structure. It has a pumping station and a gate structure that are located side by side.

Q. So let's change my hypothetical again. Let's say that the S-13 pump isn't operating, but the gates are open.

A. Okay.

Q. Then S-13A is just a gate structure; is that right?

A. Uh-huh.

Q. And the S-13A is open, so two open gates, no pumps running, no S-9 running; does the water tend to go east still?

A. Yes. Depending on general elevations in the canal, but generally, yes.

Q. Now, what are the different scenarios of [27] pumping which occur in the C-11? Those are the only three structures there, right?

A. Right.

Q. I want to know what combinations of those three structures you use and operate in the C-11 canal.

A. We have used every possible combination of them over the years. I'll start with the most common first.

Q. Okay.

A. Okay. In wet conditions, 13-A will be closed, S-9 and S-13 will both be operated to move water – 13 would move water to the east, S-9 would move water to the west. Now, going back to S-13, there are two conditions under which it could operate, pumping or under gate control, and

that would just depend on water levels out here, tide, and water levels. In other words, depending on what water levels there are would determine whether or not 13 would pump or be opened.

Another aspect of that which also has an influence on whether we pump at 13 would be the time of day. We generally try to have people at the station during the day. During the evening, based on hydrologic conditions, if we feel we could go [28] through the night with a gravity discharge, we would not call someone out to pump, we would open the gate remotely from the control room until the day crew could come in.

If the situation was such that it was heavy rainfall and we felt like we couldn't go through the night, then we would call a crew out to pump S-13, and at that point the gate would be closed and we would just be more of a pump. So that kind of describes normal operations for each of those two basins.

Q. Under wet conditions?

A. Under wet conditions.

Now, in situations where we have rainfall unevenly distributed under wet conditions, let's say for instance if C-11 east was getting a tremendous amount of rain, and not much rain was happening in C-11 west, again, we would be moving as much water as we could through S-13. If there were capacity available, it's possible that we could open 13-A and move water to the western basin.

But that is very, very infrequent. As a matter of fact, I don't think since I've been in the division, we've done that, to my recollection.



More commonly what happens in the C-11 [29] west in heavy rainfall conditions is that we will be pumping S-9, and additionally, to get some additional capacity, if we don't have heavy rainfall in C-11 east, we will man S-13, or have the structure operated manually, and open 13-A to allow some amount of water out of both ends of the C-11 canal, the east and the west.

Another scenario, which is somewhat analogous to the situation I mentioned earlier at S-13 about having the pump station staffed during the evening, if water levels come up during the evening and we feel that we can handle it with the limited capacity of 13-A, we would just send someone out to open 13-A, not pump S-9 that evening, and allow water to bleed out to the east through 13-A and 13. And when the crew comes on in the morning, they would initiate pumping at S-9, at which point we would close 13-A.

And I may not have covered every possible combination, but those are generally the sort of wet condition operations.

In dry condition operations, we are in the conservation mode, at which point we try to hold as much water in the system was we can. And in those scenarios, we really try not to pump S-9, open 13-A [30] or 13, to hold water in the system, to maintain, to the extent we can, ground water elevations in the evening.

Q. Let me stop you there for a second. You said you were trying to maintain the water levels and conserve water in the system. Which system are you talking about?

A. The C-11 system.

Q. Okay.

A. Or the regional system in general, but more specifically the C-11.

Q. Okay. So when it's dry, you try and keep the water levels up in the C-11 west system, and when it's wet, you try to keep them down?

A. Right.

Q. What's the proportion of dry time versus wet time, as you've been describing those for me?

A. It's difficult to characterize in general, and I haven't gone through the data to really be able to specifically say, so I really can't answer that question.

Q. Just to help me get an idea, is it fairly equal, or is one significantly greater than the other?

A. It's really difficult to characterize. [31] I'd say roughly even, because we do have a wet season that's roughly equivalent to the dry season. So over a long period of time, I would presume that would – but I don't know that I could point to specific operations and water deliveries and expect for those to be equal.

Q. Okay.

A. Okay.

Q. The S-13, which is sort of on the eastward side of the map we've got here, where does that discharge to when the pump is operating?

A. Okay. It is discharged generally to tide, and then there is a bifurcation of the canal that one goes to the Dania cutoff canal, and part of it goes down Old South New River Canal to the North New River Canal. And



again, both those discharge to tide, I believe in the Intracoastal Waterway.

Q. And it's the same when it's gravity driven and when it's pump driven?

A. Yes.

* * *

[32] Q. Is it fair to say that the C-11 canal [33] collects water from various sources for water management purposes?

A. Yes.

Q. I'm just trying to get an idea, and stop me if my vernacular is inaccurate. So all the water is drawn together into the C-11 canal – not all the water, but a lot of water in the system is drawn together in the C-11 canal in order to convey it out of the system or keep it in the system; is that accurate?

A. In general, yeah.

Q. If I were to go out and look at the C-11 canal, is it something I could easily identify as a canal?

A. Yes.

Q. So it's not hidden, it looks like a canal?

A. Right. Right.

* * *

Q. When water finds its way into the C-11 canal, are there places in the canal where it overflows back out into the system, or is it pretty discretely in the canal?

[34] A. I would say it's predominantly in the canal. There are probably low land areas adjacent to the canal where at high levels, water could overtop that portion of the bank. Obviously, there are secondary ditches that are connected to C-11, and water could back up from the canal into those ditches."

* * *

Q. What is the purpose of those – what did you call them?

A. Secondary canals.

Q. – secondary canals?

A. Primarily drainage flood control from the adjacent lands. But they also provide water quality – sorry, water supply elements to those lands, because water can be delivered to those lands by raising the canal level in C-11 and allowing that water to back up into the secondary canals.

* * *

[35] Q. What is the purpose of that borrow Canal?

A. That borrow canal's design was to provide a drainage mechanism for Highway 27. This particular structure also influences the drainage capability of a trailer park that's located a mile or so to the south that's on the west side of 27.

But another function that this structure has, is it does collect seepage which makes its way under the L-33 borrow canal; it does collect a component of the seepage and deliver it back to the C-11 canal.

* * *



[37] Q. What does the term "basin" mean in that expression, C-11 basin?

A. Generally, it describes a contributary area that contributes storm water runoff to a particular location. So the C-11 basin generally describes the lands which contribute storm water runoff, surface water runoff to the C-11 canal.

Q. And so it's fair to say that the S-9 pumps waters in the C-11 canal out of that basin?

A. Yes.

Q. Do the water conservation areas have a basin designation?

A. In so far as the District has identified the various drainage basins within a boundary, yes, there is a boundary that is identified as water conservation are 3-A boundary, or 3-B boundary.

[38] Q. So it's kind of like a basin in and of itself?

A. Yes.

* * *

Q. Now, you discussed seepage with me a little bit here, and you are talking about seepage from the conservation areas; is that right?

A. Right.

Q. Looking at this structure map which is Plaintiff's Exhibit 9, does the seepage occur in other areas relating to the water conservation areas?

A. Yes, It seems to be prevalent – there is to some degree seepage from conservation area 1.

Q. To where?

A. To the urban areas, and really to the canal network immediately east of conservation area 1, within the Lake Worth Drainage District in Palm Beach County. There is seepage from [39] conservation area 2, into I think it's the L-38 canal. There is a good amount of seepage that comes from conservation area 2-B in the North New River Canal. And of course we talked about the seepage in L-33 and L-37 into C-11. There's also seepage from L-33 into the C-9 basin.

And then there is also a seepage component from L-30 into the Pennsuco wetlands and western portion of urbanized Dade County. We have seepage issues all along L-31 north adjacent to the Everglades National Park, and even to some degree, into the C-111 basin.

Q. That's pretty much all along the eastern Everglades remnant; is that correct?

A. Correct.

Q. So everywhere you have Everglades on the east side, you've got some seepage issues?

A. Right.

Q. Do you have any seepage issues on the western side of the water conservation areas, like around the L-20?

A. I think it's the L-20. Let me look at this map here. L-28.

Q. L-28?



A. L-28. I'm not as familiar with those. [40] Generally, the northwest corner of conservation area 3-A is drier than the southern portions, so I'm not certain that there's seepage issues. But I'm sure conditions could exist where there would be seepage from that area.

Q. Are there seepage issues around the EAA?

A. Yes.

Q. Which way is water seeping there?

A. Again, depending upon the hydrologic conditions, but when the conservation areas are up high, there can be seepage from the conservation areas into the Everglades Agricultural Area.

Q. Which, for the record, is that area sort of north and west of the conservation area?

A. Right.

* * *

[41] Q. I see. So the white area is the South Florida Water Management District?

A. Correct.

Q. And then the brown area is Big Cypress area, and the green area is Everglades National Park, and then the sort of teal-colored area is the conservation areas; is that right?

A. Right.

Q. Okay. It's kind of an odd shape for the South Florida Management District. Do you know of a reason why it's sort of jerrymandered the way it is?

A. Not specifically. However, it's my understanding that when it was developed, the intent was to encompass the main land areas that contributed to the Kissimmee-Okeechobee-Everglades drainage system – hydrologic system, I should say.

Q. So it's fair to say that it's all sort of hydrologically connected?

A. Yes.

* * *

[44] Q. . . . what are the sources of water entering C-11 canal?

A. I guess in a general sense, probably three general sources: One being direct rainfall on the canal, the second being storm water runoff from the contributing area in the basin to the canal, and the third being seepage input from the conservation area.

Q. Is there any ground water contribution to the canal, other than seepage from the conservation area?

A. Yes. Direct rainfall – as a portion of [45] direct rainfall infiltrates directly into the ground water table, that probably migrates either directly underground to the C-11 canal, or to a secondary drainage ditch, which would then convey it as surface water to the C-11 canal.

Q. So it would be fair to say that ground water is also an additional, or it's another expression of the rainfall that is entering the C-11 canal?

A. Yes, that's correct.



Q. Do any of the structures that you know of, private or public, influence the ground water table in the area, and if so, how?

A. I can't point to specific examples, but I would say in general, some of the systems in this basin are designed to conserve to some degree storm water, but at the same time, not compromise flood protection.

Many of the ones that were developed in accordance to the District's permit criteria or the county's permit criteria fall into that category; that is, where the surface water management systems attempt to do two things, maintain some level of ground water for conservation purposes, and the second being to convey it to discharge points for [46] flood protection. So in that sense, they would to some degree affect the ground water table adjacent to them.

Q. What kind of structures or systems are used to influence the ground water in this way?

A. We talked about a few of them. You could have corrugated metal type structures, or even concrete structures with risers that have stop logs or weir crests to hold water behind that structure at a certain level.

Many of the newer developments have lake systems, which have a tendency to attenuate levels, and then can contribute water to the ground water system. Again, those are typically more passive.

However, there are some systems that are pumped, and those primarily are for flood protection, some secondary systems that have pump outfalls. And again, the pump on-and-off trigger levels are set to provide a level of flood protection, but they also, I'm sure, have an element

of ground water control as well built into their operating criteria.

* * *

[47] Q. To your knowledge, is pollution entering the C-11 canal?

* * *

THE WITNESS: I guess the general category of pollution, I'm not – I can't address that. I am familiar that there are some constituents, water quality constituents that are issues in this area.

BY MS CARROLL:

Q. Which constituents are issues in this area?

A. Just from a general standpoint, phosphorus, dissolved oxygen, Ammonium – Ammonia. There may be some pesticides that are issues.

* * *

[50] Q. The S-9 pump station, how many pumps are involved at that station?

A. There are three.

Q. And what are their sizes and configurations?

A. If I can refer back to Exhibit 2 for that. It says: "The pumping station is equipped with three Nordberg 122-inch diameter vertical lift pumps, each rated for 960 cubic feet per second at a 10.4 foot static head." I guess that generally describes the technical specifications. I don't know if that answers your question or not.



Q. Right. So each one of the pumps can pump 960 c.f.s.; is that correct?

A. That's correct.

Q. Do they run all at the same time?

A. No. Only during – I won't say only during. To answer your question specifically, you can run one pump, two pumps, or all three, and depending on the conditions, we will do that.

Q. How does the water – strike that.

What do the pumps do with the water in the C-11 canal?

A. In very basic terms, they basically take the water out of the C-11 canal east of the L-37 and [51] the L-33 levees, and they generally just pick it up and put it over on the west side of the levee through a pipe system that's part of the pump station.

Q. And correct me if I am wrong, there are three pipes on the west side; is that correct?

A. Correct.

Q. And the water discharges out of those three pipes?

A. Right. That's correct.

Q. If you don't run the S-9 pumps, any of those three pumps, the water doesn't go out of those pipes; is that right?

A. That's correct.

Q. The water pretty much stays in the C-11 canal?

A. Right.

Q. Is it fair to say that you're adding water from C11 to the water conservation area?

A. I don't know if adding. I guess moving water into it from the east side to the west side. Whether it's an addition or not, I don't know.

* * *

Q. Well, we were talking about there were three pump stations. If you just operate one of those pump structures, does the water just discharge from one of those points?

A. Right.

Q. I'll call them pumps one, two, and three.

A. Okay.

Q. If I operate pump one and pump three, then I have water discharging from pipe one and pipe three; is that correct?

A. That's correct.

* * *

[63] Q. Is the S-9 a Critical Project?

A. It's my understanding that the S-9 structure is a component of a Critical Project that deal with a little larger area, the western C-11 basin.

Q. What does it mean to be a Critical Project?

A. I can give you what I think is a general definition of that, and that is projects that were identified through



the Restudy process that were accelerated to be constructed, or planned and constructed early on in the process which was authorized through the Water Resources Development Act recently passed, I don't know, '96 or '97.

* * *

[65] Q. Were Critical Projects identified in part because there was a problem to be addressed in the Critical Project area?

A. That's my understanding, yes.

Q. What was the problem to be addressed in the C-11 basin?

A. My understanding was the general water quality concern for water being discharged from C-11 into conservation area 3.

Q. Do you know what those water quality concerns were?

A. Not specifically, no.

Q. Okay.

A. Let me go back and clarify that.

[66] Q. Okay.

A. Phosphorous obviously was the one that was a topic of a lot of discussion, but not to say that was the only one. That's the one most people focused on as an issue.

* * *

Q. Has the C-11 Critical Project been implemented yet, or is it something that will happen in the future?

A. It's something that will happen in the future.

* * *

[68] A. Well, one of the things that happens in all the canals in South Florida on the urban side is that as water levels are drawn down, ground water that's in the adjacent ground will come out of the sides of the canal, infiltrate from ground water into the canal.

Typically, that has a low dissolved oxygen content because it's underground, it's not subject to biological activity, and it has a long residence time. And so by maintaining higher levels and less fluctuation, you reduce the potential inflow of that ground water.

* * *

[70] Q. If the water levels rise in the C-11basin, what are the types of effects that you see?

* * *

Q. Okay. You start pumping at the S-9 when the C-11 canal gets to 4 feet above sea level; is that right?

A. Uh-huh.

Q. Let's say you let it go to 5 feet above sea level, what would be the visible or recognizable impacts in the C-11 west basin.

A. There are probably some low-lying areas at five that you would start to see some impacts. By that, I mean, you know, you might see surface [71] ponding on land. Certainly in some of those areas, the ground would be very wet.



But the real critical nature of that would be during the storm event, if you had that antecedent condition, where basically all the soil storage was taken, you would see a significant amount of flooding. So in a dry condition, it could just look real wet, but in a rainfall event, it would be the predecessor to probably some significant flooding.

Q. The C-11S is a canal, right, it's a canal?

A. Yeah.

Q. "C" means canal, right?

A. Yes.

Q. Okay. Has it ever been explored, the possibility of increasing discharges through the C-11S for the C-11 canal for flood control purposes?

A. Let me make sure I understand when you say "increasing discharges". From C-11 to C-11S?

Q. Yes.

A. No. To my knowledge, that's never been evaluated as an option.

Q. Is it a potential option?

A. I'm going to say anything is a potential [72] option. It has some downsides and some constraints that would need to be evaluated.

* * *

[73] Q. So does that mean some of the water from the North New River Canal also can end up in the C-11 canal?

A. Downstream of S-13, but not upstream of S-13.

Q. When you say upstream, you mean west?

A. I mean west, right. So I mean, it's possible if you had a high-flow condition in the North New River Canal, some of that water would come back into the lower reach east of S-13. But that's generally at sea level or a few feet above, and that reaches higher than that. It would really be a rare [74] situation for this water to come back around and go west. And again, I'm confining what we are talking about to the area east of L-37 and L-33. There is a whole network of remnant ditches, or even project canals that are out here that interconnect in the conservation area.

Q. Do you know what different types of uses contribute water to the C-11 canal and the C-11 basin?

A. Just general land use. I know there is a mix of urban and agricultural type land uses. I presume there is some industrial, but I don't know that for a fact. But predominantly, it's my understanding it's urban and some agricultural.

* * *

[81] Q. What were the flows of the Historical Everglades?

A. Well, just real general, is the sort of typical scenario of the Kissimmee, Lake Okeechobee, Everglades ecosystem, where runoff from the upper chain of lakes in the Kissimmee region would flow through the Kissimmee River into Lake Okeechobee through tne course of the natural system. When Lake Okeechobee would rise, it would spill over its southern bank and then flow through the natural Everglades system, sort of in an arc, a sweeping motion towards the southeast initially, and then it [82] would turn as it came into the Dade County area, back to



the southwest, as it went through Everglades National Park and Florida Bay. And again, the only area that wasn't Everglades was probably along the coastal ridge.

Q. Tell me if you agree with this or not. It's been stated to me before that hydrologists coming into the Everglades system from outside find it very unusual, or non-characteristic of hydrology they experienced in other places. Would you think that's generally true?

A. I would say particularly if you're talking – I agree in the context of the United States. I don't have a relative measure of comparison for people from other countries that might have experienced similar systems. But my general experience has been hydrologists and engineers who have come from other parts of the country find this a unique system.

Q. What is it that's unique about it, hydrologically?

A. One thing would be the sort of lack of topography, that's the comment I probably get most often that most other hydrologists and engineers are used to dealing with, you know, tens of hundreds of [83] feet or more in elevation. The flatness complicates the interconnection of drainage basins, which makes it very difficult to say this basin is independent of other drainage areas.

And so it's sort of the kind of inter-connectivity of the system and its flatness, and the slowness in which it responds to regional rainfall. With the exception of the east coast, the Everglades really responds pretty slowly to changes in climate and rainfall. In other parts of the country, characterizations are made that things happen a lot faster. So those are just some typical examples. There may be many more, but . . .

Q. What is the history of the South Florida Flood Control Project?

A. I'll start at the authorization, and maybe go back a little before that. In the late 40's, a couple of hurricanes came through back to back, and essentially inundated the Florida peninsula from Florida Bay all the way to Jacksonville. And that was met with a public outcry from the people in the state that something needed to be done to remedy that situation, at which point, a plea was made to the federal government.

And the Corps of Engineers came into the [84] picture with a plan, to deal not only with flood control issues, but to deal with water supply issues that were becoming evident as a result of the canals that were dug by the Everglades Drainage District. Not only did they not do very much for flood control, they did a lot to damage water supply, and created areas where we were susceptible to salt water intrusion.

And so the Corps came in to kind of deal with both of those. In addition to that, part of its mission was to deal with wildlife protection and preservation; and navigation were also issues as part of the original system.

At that point, from 1949 or '49, when the project was authorized, it was basically under construction from that point, even into the 70's, and there were actually some parts of the system that were originally envisioned that are yet unconstructed.

Q. How long has the S-9 pump station been there?

A. I believe 1957 is when it was finished construction.



Q. And it's on a levee. What levee is it on?

A. It's actually on the divide point between [85] two levees, L-37 and L-33.

Q. And how long have those levees been there?

A. I believe they were there just the year before, a year prior to the pump station. It was like '56, somewhere in there.

Q. Your expert witness summary suggests that you will testify that: "The operation of the S-9 pump station will not add any detectable pollutants to the waters passing through the pump station." What does that mean?

A. I guess it means that just the pump station in and of itself, and its operation, that doesn't add pollutants from the station.

Q. Do you mean –

A. I won't say any. I wouldn't categorize that – I caveat that by saying any noticeable pollutants. Obviously, everything has some minute effect, but that for the most part, there aren't any oils or greases or things like that that might be a noticeable problem.

Q. So when you would make that kind of testimony, you're talking about actually the station itself –

A. Itself, correct.

Q. – providing pollutants to the water?

[86] A. Right.

Q. You're not going to express an opinion that the water – a legal opinion, or other opinion than that the

water being discharged by the S-9 doesn't add pollutants to the water conservation area?

A. No.

* * *

[87] Q. Mr. Strowd, your expert witness summary indicates: "Mr. Strowd will testify regarding the Corps' Restudy of the C & SF Project and the Critical Project proposed for the pump station."

Is there more that we haven't discussed [88] that would be addressed under that?

A. Yes. I think particularly with regard to the Restudy element. Over the last year, what the Restudy has done that we didn't have last year is they have come up with a conceptual plan, a comprehensive plan, which addresses some of the issues we've talked about associated with the C-11 west basin. And they proposed some facilities to capture, hold, and even divert water from the C-11 basin to another source, another point, a discharge other than S-9.

Whether or not it would remove all S-9 discharge is probably not the case, but it certainly looks to reduce the magnitude and frequency and even duration of S-9 discharges to the conservation areas. And they've got a fairly detailed conceptual plan that lays out new canals, new pumps, new structures, new impoundments that are forced towards dealing with some of the issues we've talked about today.

* * *

[89] Q. What exactly does the conceptual plan the Corps proposed or contemplated do for this basin?



A. I'm going to caveat it as saying exactly, I probably can't tell you every detail without having the maps and documents in front of me, but I can give you a characterization of what it does.

Q. Okay.

A. There is an impoundment which is proposed just east of Highway 27 North of C-11, into which some water would be diverted, as opposed to it being discharged at S-9. This presumably would work in conjunction with the gate we talked about earlier that's on US 27. It would allow that gate to remain closed more frequently and for longer duration, because it would have a place to basically put the water that I mentioned earlier, would tend to fill C-11 up and require us to pump at S-9.

Q. Can I ask you about that aspect of it, and I'll let you go on with the other aspect of it.

[90] A. Sure.

Q. Is that like a lake or an STA. What kind of impoundment are you talking about?

A. It's not a lake, because they wouldn't be excavating down into the ground. It would probably look on the surface like an STA; it would be a levee encircling the area, and water would be pumped into it.

But my understanding of the component is it wasn't designed to function like an STA in the sense that it will allow water to pass through and meet water quality standards upon discharge from the impoundment. It would be simply a storage area. A levee would be constructed on top of the ground, water would be placed into that, allowed to rise up to a depth of 4 feet or maybe more,

and it would hold that water until after a storm event. At which point, it could be released at a lower rate, either for water supply to the C-11 west basin, or it could be diverted to some other use, down a portion of the system I'm going to describe in a little bit.

Q. So the objective is to reduce the amount of water you have to discharge in the conservation area?

A. Right.

[91] Q. Tell me about the other components.

A. The other components, another element that was proposed, was a new conveyance canal which would extend from roughly the North New River Canal; it would extend along, follow the path of US 27. I don't recall whether it was east or west of 27, but this canal would run along the alignment of 27 – and I'm going to switch maps here – all the way down from North New River, past S-9, down to the Miami Canal.

There were a number of real complicated structures that were being added or reconfigured here, which would allow water to go a lot of different directions.

Q. Here being?

A. Here at the intersection of this new canal in 27, and the Miami Canal.

Q. Okay.

A. One of those purposes would be to allow water from this new north-south canal to go across the Miami Canal into a new series of impoundments that are being proposed in the Lake Belt region. These impoundments are somewhat unique, in that they're not a typical impoundment



like I described earlier, a piece of land where a levee is [92] constructed around it and water is allowed to stack on top of the land.

These impoundments would use the excavated hole, in other words, that the Lake Belt or the mining interests are excavating, in addition to building a levee around it. So instead of having an 10-foot deep reservoir, you wind up with a 20-foot deep reservoir by digging down into the earth 10 or 20 feet, and going up 10 feet or so. So you can have a reservoir that might have a 30-foot depth in that area.

And once the capacity of this reservoir impoundment that I discussed earlier was reached, in other words, it was full, then water could be diverted down from C-11 down this new canal into this impoundment in the Lake Belt region.

There were other possible destinations for this water, that the theory here would be there was enough storage capacity to hold the water through the wet season, and then in the dry season, taking that water and providing it for water supply purposes, and so therefore diverting it from conservation area 3.

* * *

[93] Q. Do you have any idea of how long it would be before construction of any of these features was undertaken?

A. No. My understanding of the process which it goes through is that it would have to develop more detailed feasibility studies, and construction plans as a result of that. And there is a schedule, I've forgotten what it is, and so I can't really give you dates. But it's not –

construction won't [94] be initiated once the plan is authorized, there are some other processes that need to be gone through.

Q. Is it fair to say these major features are years into the future?

A. Yes. Yes.

* * *

[96] Q. Has there ever been, to your knowledge, a concern expressed about the effects of pumping itself, other than re-suspension of sediment on water quality?

A. I think one of the issues the report points to is that there was some discussion, or – I won't say theory, that's a little scientific, but I'll use that for lack of a better term – theory that pumping actually moves ground water adjacent to the structure, so that ground water underneath the structure would migrate up and would be discharged into the surface water on the downstream side. And I've heard that there are elements of that in this document.

Q. Does that have ramifications with respect to D.O. or ammonia, or some other constituent?

A. D.O., possibly. I don't know about [97] Ammonia. In the context of the Everglades Agricultural Area, there is chlorides that are an issue, because the ground water there is high in chlorides.

Q. What about S-9?

A. I don't know if there's a chlorides issue. I haven't heard of any issue of chlorides in the ground water in S-9.



Q. You talked about ground water earlier. Correct me if I'm wrong, but ground water sometimes has low dissolved oxygen?

A. That's correct.

Q. So if the S-9 pump station is pulling up ground water, that might contribute to low D.O. in the water being discharged through the S-9?

A. That's possible.

Q. You also brought the book Everglades, The Ecosystem and its Restoration, edited by Steven M. Davis and John C. Ogden. How does this contribute to your decision?

A. We mentioned earlier one of the things that my testimony may be directed to discuss would be Historical Everglades. This is probably one of the best volumes that summarizes what the Historical Everglades were, to the best of anyone's [98] understanding, and how the C & SF Project has affected it all through that. So it's a good summary of the existing body of knowledge.

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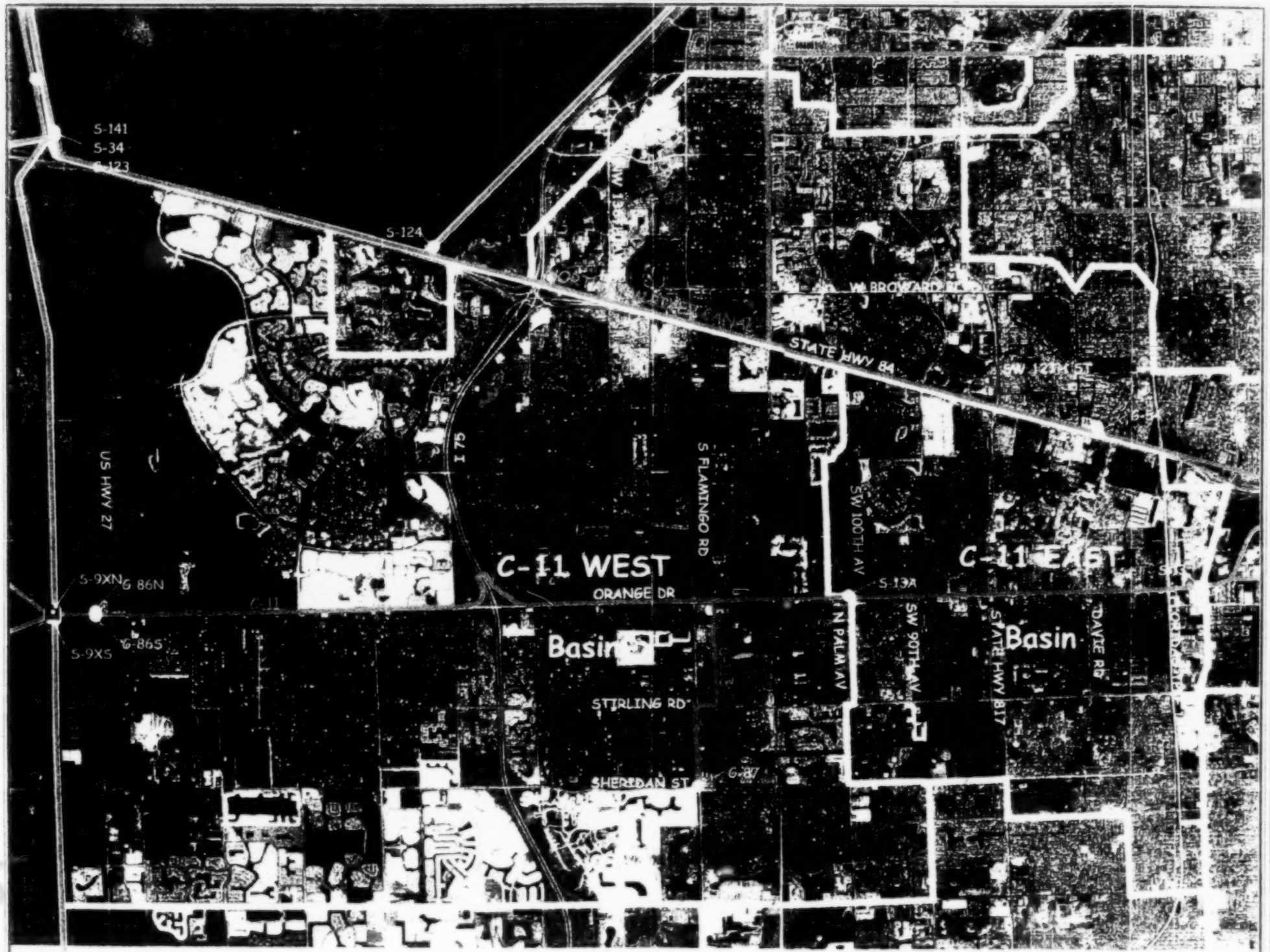
EXHIBIT #9 (MAP INSIDE BACK COVER)




# C- 11 Basin
# Broward County
# Florida

Legend

- Ft Lauderdale Field Station
- Manned Pump Station
- SFWMD Structure
- SFWMD Canal
- Drainage Basins

**South Florida Water Management District**

Operations & Maintenance Department

3301 Gun Club Road
West Palm Beach,
Florida 33406

PLAINTIFF'S EXHIBIT
#110

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Exhibit 11
Deposition of Tommy Strowd
December 14, 1998

Pages i, 1, 2, 48, 70, 71, 74, 75

**TECHNICAL MEMORANDUM**

# AN ATLAS OF EASTERN BROWARD COUNTY SURFACE WATER MANAGEMENT BASINS

**By**

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DRE-231

**November 1987**

**Water Resources Division**
**Resources Planning Department**
**South Florida Water Management District**

## EXECUTIVE SUMMARY

* * *

The surface water management basins of eastern Broward County, Florida, were first delineated in the 1950's by the COE in their *General Design Memorandum* (GDM) for the Central and Southern Florida Flood Control Project (Project). Based on the hydrology of the basins, the COE designed and constructed a system of canals, levees and control structures to provide flood protection for southern and central Florida. The Project is dynamic with new works being constructed and old ones being modified to meet the changing needs of southern Florida.

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The Project canals in Broward County serve a variety of functions. The primary function of all the canals is to provide flood protection for the basins in which they occur. Secondary uses of the canals include land drainage for agriculture and urban or residential development, and regulation of groundwater table elevations to prevent saltwater intrusion into local groundwater. Many of the canals are used to supply water for irrigation and to recharge the wellfields of local municipalities. Three canals, the Hillsboro Canal, C-14, and the North New River Canal, are used to discharge excess water from the Water Conservation Areas to tidewater.

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## INTRODUCTION

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The Project is dynamic. As the population in South Florida has grown, and as land use and water demands have changed, the Project has evolved in response to these changes. Some parts of the original Project were never built, other parts have been rebuilt or modified, and as the need has arisen, new structures have been designed and constructed. In some cases, the basins themselves have been redefined. As the COE can not always participate in construction of new works, the District has occasionally assumed responsibility for the design and construction of additions or modifications to the Project.

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### Using the Basin Descriptions

Surface water management basins (hereafter drainage basins) in Broward County are identified by the same



designations as the major Project canal located in that basin.

* * *

## C-11 (SOUTH NEW RIVER CANAL) BASIN

### Description of the Basin

The C-11 basin has an area of approximately 104 square miles and is located in south central Broward County. The C-11 basin is divided into a western basin (81 square miles, . . . ) and an eastern basin (23 square miles . . . )

* * *

## APPENDIX 1 - BASIC CONCEPTS

**Runoff and Drainage** – Several things can happen to rain after it falls to earth. At the beginning of a rain event, the rain will most likely seep into, or "infiltrate", the soil. As soil becomes saturated, however, the rain will tend to pool on the surface of the ground in puddles or ponds. These detention areas have only a limited storage volume, and when their capacity is exceeded, the excess water will flow downhill to the nearest stream or canal. That part of the rainfall that "runs off" of the soil surface to enter local streams is termed "surface runoff". Of the water that is detained on the surface, some will evaporate and the balance will eventually seep into the ground.

Water seeping into the ground enters a reservoir of subsurface water known as groundwater. Since, in south Florida, many soils are very sandy and underlying rock strata tend to be very porous, water flows easily between

surface water and groundwater. The surface of the groundwater is known as the "water table". When the water table level is higher than local surface water levels, water will enter the surface water from groundwater. When the water table is lower than the local surface water level, flow is from surface water to groundwater. In general, groundwater supplements stream flow during periods of low rainfall, and surface water recharges groundwater storage during periods of high rainfall. Although subsurface flow from groundwater to surface water is important to the long term supply of water to a canal or stream (it is sometimes referred to as "base flow"), it does not make significant contributions, if at all, to streamflow during storm events with high rainfall.

In the context of these basin descriptions, the term drainage is used to refer to the total surface and subsurface flows entering a canal from its drainage basin. It may be useful to keep in mind, however, that during a rain event (especially one severe enough to cause flooding), it is surface runoff that is the important contributor to this flow, and at times between rain events, subsurface flow from groundwater to surface water is most important.

* * *

**Control Structures** – The structures referred to in the basin descriptions are devices (e.g., weirs, spillways, and culverts) placed in the canals to control water surface elevations (stage divide), amount of flow (stage divide or water supply structure), or direction of flow (divide structure) in the canals. A structure may have more than one function. In general,, a stage divide controls water surface elevation upstream of the structure, and it controls water flow (or discharge) downstream of the structure. A divide



structure is usually located at or near a basin boundary. It prevents water in one basin from entering the other basin. A water supply structure is also usually located near a basin boundary. It is used to pass water from one canal to another (i.e., from one basin to another).

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## APPENDIX 2 – GLOSSARY

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### Terms

Water Conservation Areas

The five Water Conservation Areas (WCAs 1, 2A, 2B, 3A and 3B) are located in western Broward and Dade Counties and in central Palm Beach County. WCAs 2A, 2B, 3A, and 3B border on basins described in this publication (Figure 1). The WCAs are remnants of the original everglades in South Florida. Water is impounded in the WCAs by Project levees, and water flow into and out of the WCAs is regulated by various Project control structures. The WCAs are managed to store water and to provide viable wetlands habitat. Water is stored in the WCAs according to a set of regulation schedules, one for each WCA. A regulation schedule specifies the level of water to be held in the WCA at any time during the year. When the water level in a WCA exceeds its schedule, water is released from the WCA through the structures on its periphery. These are called regulatory releases. If the water level in the WCA is below the regulation schedule, releases from the WCA are restricted. During periods of low natural

flow, water stored in the WCAs can be supplied to basins in Broward County.

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**Deposition of Ronald Jones**
**December 16, 1998**

* * *

[18] A. The C11 basin was an area that had a long hydro period.

Q. What do you mean by a long hydro period?

A. The water was on the ground, you know, 350, 360 days a year. It dried out seldom, historically.

Q. So, it's what we would characterize as historically a very wet area?

A. Yes.

* * *

[19] Q. So, the area on the S-9 would be the area where the water would start to go maybe from south to southwest as it curls into the southern regions?

A. If you look at what people have assumed to be historic maps, you know, because there's a lot of it, that's – I don't know how much reliability you can place in some of the stuff, but certainly that would be the indication that would be the area where you are flowing pretty well south or it was flowing – starting to turn to the southwest.

* * *

[29] A. No, not particularly. I think everybody in that group just assumed that everybody understood that there was a water quality problem associated with water being back pumped into the Everglades.

The water on one side, suburban, urban, agriculture, Davie dump, ranches, horses, you name it in there, and

the water is highly contaminated with those types of activities, and the water on the other side is Class III Everglades water, which virtually has nothing in it.

Q. Everything you named just now is part of the activities that are located in the C11 basin?

A. That's correct.

Q. Among those you said, agriculture, horse, residential, urban and a landfill?

A. Amongst a few. Nurseries. They used to burn refuse out there. There's a prison.

Q. Have you done any studies that would [30] indicate the influence that the pump station itself has on the water that runs through the pumps?

A. The pump station on water that goes through the pumps? The pump station is just moving the water in sort of an unnatural direction, back into the Everglades.

Q. But do you know if the operation of the pump station is adding any pollutants or other chemicals to the water it's conveying?

MS. CARROLL: Objection, form.

THE WITNESS: It could be adding oil or diesel, but I have no idea whether it's – I mean, whether, you know, any of the typical things that would occur from running the diesel engines and the pumps would be – being added to that or not. That's never been the issue we've ever discussed.



BY MS. SOLE-CALAS:

Q. The issues that you have discussed and been concerned with, are the land uses and their contributions to the water, and to the C11 canal. Is that correct?

A. The issues we've discussed, is the water on one side of the levee the same as the [31] water on the other side of the levee, and the answer has always been no, and we have to find some way to keep the water that's highly polluted from entering waters that aren't polluted.

* * *

Q. You're talking that the water that is now going through the S-9 pump station, into the water conservation area, contains pollutants. Correct?

A. Correct.

Q. Those pollutants, did those enter the water upstream of the – I'm sorry. Let me rephrase that.

Did those pollutants enter the water before reaching the S-9 pump station?

[32] MS. CARROLL: Objection, form.

BY MS. SOLE-CALAS:

Q. Did you understand my question?

A. Yes, I think so. The pollutants originate in the C11 basin. That's about the best I can answer that.

* * *

[34] Q. You mentioned you could see the ground water seeping under the levee, you said?

A. When the pumps are on and they've drawn down the canal, you can see the water coming out of the levee and into the seepage canal.

* * *

Q. Have you done any studies involving ground water and its effects in the Everglades?

A. We have a problem when we talk about ground water in the Everglades. Ground and surface waters are essentially the same thing.

So, it's unconfined. It's hard to say that, because you go to one place where the Everglades are dry, and then you go two kilometers downstream and they're wet again, and the water is flowing. So, it was ground water that came to the surface there, and it's an [35] unconfined aquifer, from the standpoint of a surface confinement or surficial aquifer, if you will. So, it's hard to decide what is ground water and what's not, what's not ground water.

We do collect samples from wells put down into the lime rock. We do collect samples placed into the peat layer to look at interstitial water quality, and both of those by definition would be considered to be ground water, but I am not a subsurface, you know, hydrologist or a particular water thing. We just have to look at those parameters, because they are intimately connected with the surface waters.

Q. In your experience dealing with, I guess, what we just talked about, it seems that ground water flows constantly into surface water and then surface water into ground water, depending on the water table. Is that correct?



A. Depending upon the slope of the land, where the water table is and where the land is, you know, you're developing a – some sort of a hydrostatic head that forces water to move in one direction or another.

Q. When you are talking about hydrostatic [36] head, is that what exists at the S-9 pump station with the water elevation higher in the water conservation area than in the basin?

A. Right. Or the other way around.

Q. When water is higher in the basin than the water conservation area, it can then seep into the water conservation area?

A. I don't know it's ever occurred, but it's physically the way it works.

Q. When you did your study specifically in the mountains, I think you said, of Washington State – is that correct?

A. Yes.

Q. Did those studies include any analysis of ground water movement there?

A. I think the rock is pretty – pretty dense there. There's not a whole lot of ground water moving through, you know, basalt or some of the other types of rock we have at that point. No. It's pretty solid.

Q. So, basically, it would be very different geological conditions and hydrology than what you see in the S-9 basin?

[37] A. Yes, I mean, let's face it. We're talking about an ice melt mountain lake, you know, and that's hard to compare with the Everglades.

That's the problem most people make, is they assume wherever they were is like the Everglades, and when they come down here they try to apply the same theories and ideas, and they're generally wrong.

Q. So, in the C11 basin – I guess the C11 canal and the C11 basin are hydrologically connected with the water conservation area in the sense that ground water can flow back and forth?

A. Well, I wouldn't go as far as to say – you see, you used the word "could," and I would use that word very, very – could, you know, big time, because it's not flowing back and forth. It's basically flowing from the west to the east. And there would be, I guess, conditions where we could be flooded in that area and the water level would be higher in the C11 basin than it is in the conservation area.

* * *

[38] Q. What I'm saying is, it's different than the mountain where you have, I think you said, granite and basalt."

A. I think it's – there the water flows surficially, and here the water flows surficially and through the ground water. We have a much more porous type of situation. That doesn't mean there's not a direction in which it flows predominantly, and what exists out there now and what existed out there in 1800 are two different things.

Right now we give flood protection to the people living in the C11 basin, which means the water levels are maintained



at a low head, if you will, so the conservation is generally always higher. I don't know of any situation where it's not been higher than the basin. That's why we have the pump there.

* * *

[40] Q. Do you know if the C11 canal is cut into what would be the ground water table?

A. Yes, it is.

Q. So, the C11 canal would normally contain ground water. Is that correct?

A. The amount that gets into the C11 canal, it contains surface water.

Q. It becomes surface water?

A. Yes. There's a lot of tributaries going into it which contain surface water, which feed surface water into the canal.

* * *

[44] Q. With S-9, what is it that you were looking for, or what was you involvement specifically with the critical project?

A. Originally, the critical project was to [45] look at the design and development of periphyton technology to clean up the water at the S-9. It got changed into a monitoring and BMP, you know, plan, if you will.

* * *

[50] Q. What was the basis for thinking that the PSTA would be the solution for the problems from the C11 basin?

A. Because of the relatively low concentrations of phosphorus and other nutrients in the water of the C11 canal. Relatively low. They're not 200 parts per billion, like they are coming out of the EAA.

The fact that there are areas that have very, very shallow depths of soil out near the S-9 pump, which could leave – they could be cleared off, which would leave them very susceptible for the technology.

[51] Q. What were the ranges of the phosphorus concentrations in the C11 canal at this time?

A. I think it's – it goes from like 20 to a hundred, you know, maybe a little less than 20 to over a hundred. That's the ranges I've seen in the Bill Walker's report.

* * *

[61] Q. Do you know what plans the restudy has for the S-9?

A. I think the restudy assumes that the S-9 is going to be delivering clean water.

* * *

Q. Have you developed any opinions as to the water quality from the C11 basin, if it's changed, let's say, in the last five or ten years?

A. Other than from the Walker report, which indicates that it's getting worse, I don't [62] know of anything that – I haven't seen anything. I haven't developed any – I haven't used any data to try and look at a trend analysis or whatever.

Again, my point is, it's not good enough to be put into the Everglades. I don't care whether it's going up.



Q. Have you done any analysis on the different areas of the C11 basin and their contributions to the water quality problems?

A. Those studies I believe are what are taking place or supposed to be taking place now as part of the monitoring effort, which I think is a noble effort, to provide useful information, and it's going to demonstrate they need to do something to clean up the area, and I don't know why we're not figuring out how to clean up this stuff. We already know there's a problem.

* * *

[64] A. All of the indications are, Bill [65] Walker's paper, all of the studies, everything you can possibly imagine, with the restudy, the way water is going to be directed, only indicates the water quality is going to get worse.

Q. What is going to make the water quality worse?

A. The seepage water will become a smaller and smaller component because of the buffers, and so the water that gets back pumped will have less component, less proportion of seepage water, which is the water coming out of the Everglades, which is relatively clean.

As that component goes down, the proportion of the water that is coming from the basin is going to go up, and there's really very little you can do to make that water – there are ways you can limit or, if you will, mitigate additional inputs of phosphorus and pesticides and whatever into that area, but there's very little you can do to correct the problem that's already there.

The Davie landfill, for instance, is a major contributor to pollution in that area and, basically, all they can do is pump the water off there and haul it to a sewage treatment facility.

* * *

[66] A. There's water that's got a higher level of pollution in it, and there's water that has a lower level, and they're being mixed. When the water from the Everglades seepage gets taken out, there's every reason to expect the concentrations of material will go up.

Q. What, if any, efforts are taken to combat the sources of pollution that exists in the basin?

A. If anybody can demonstrate to me or find any place in the world where BMP has reduced the phosphorus concentration, we will just stick with phosphorus in this thing, where BMP has reduced the phosphorus concentration to the level where it can go into an oligotrophic system like [67] the Everglades, I would love to see it, because I think that would be tremendous, but I can tell you, you can search the literature, have all your experts search the literature, have all your experts, have the whole State of Florida search the literature, you will not find a place where BMPs has that effect. They are effective. Don't get me wrong. I think it's a tremendous thing to be done, but it's not going to be enough. That's all there is to it, and it's there's pretty good models for how limited it's going to be.

Q. I want to clarify part of your answer. When you say BMPs alone at the sources will not be enough, do you mean it will not be enough to reduce the concentration of phosphorus in the water to 10 parts per billion?



A. It will not be enough to reduce the concentration of phosphorus to concentrations that won't cause imbalances and violate the Class III water standards in the Everglades. Whether that number is 10 parts per billion or 8 to 13 parts per billion is, you know – I don't think that's going to occur with BMPs.

* * *

[70] Q. Pesticides, you mentioned. Is pesticides a problem in the water coming from the C11 basin?

A. Yes. We have a number of hits, you know, of pesticides, both in the sediments and in the water.

It's a matter of definition. A lot of times the law states that none shall be detected. [71] I don't know whether that's – we could argue for days on whether that's overly protective or not, but the fact is, that some is being detected, so there are violations.

Q. The source of those pesticides would be what?

A. It's unknown, but the pesticides are generally a big problem in suburban-urban habitats, more than they are in ag. You can regulate them in ag and see what's going on. I'm not going to say ag is not a responsible party out there, but I'm pointing out it's much more difficult to regulate the yard owner, the homeowner, who decides to put twice as much diazinon on his yard or twice as much atroscine on, does it three times instead of twice a year, and doesn't read the directions that says don't spread it more than a hundred feet from any surface. It's hard to regulate them, so we tend to have more problems with that.

* * *

[73] THE WTINESS: The operations of the pump, resuspending sediments off the bottom and bringing that in, certainly can deliver heavy metals and pesticides a lot more.

* * *

[74] Q. What materials would attach themselves to these sediments, again?

A. Almost all of the pesticides and herbicides in common use have an affinity for sediment, if you will, organic matter, particularly, and most of the heavy metals, most of the metals, period, do also.

Q. Would phosphorus?

[75] A. Yes. Phosphorus is generally in higher concentrations in the sediment than it is in the water column.

* * *

[80] Q. What do you mean by two different masses of water?

A. It means the water is different on one side of the pump station than it is on the other, and the Everglades water has another pH. It's a [81] characteristic that shows they're different bodies of water.

* * *

[83] A. Specifically at the S-9, I don't know whether phosphorus is still the limiting factor. It certainly is, as you go further out away from the S-9, but the areas immediately surrounding the S-9, actually quite a distance surrounding the S-9 pump in the water conservation area, is very, very highly polluted.



The phosphorus concentrations are at their maximum levels. They can't get any higher than they are.

* * *

[85] A. In the Everglades, on the whole, phosphorus is the nutrient which is in limitation. In other words, it's what keeps the organisms from growing or from metabolizing, and if you add additional phosphorus, they can grow more, and they can metabolize more, until they have enough phosphorus, and then whatever the second most limiting component is, which is generally nitrogen, although that may not be the case in the Everglades, then it becomes limiting until it gets to a high enough concentration that the third most, and it keeps on going on and on and on and on, until finally you run out of things the organisms need.

* * *

[89] Q. If you haven't had any flow in the C11 canal, and what you have is seepage coming from the water conservation area, and you take a sample on the east side of the pump station, and you take a sample from the west side of the pump station, in the water conservation area –

A. They could be the same under those circumstances. The problem is not that. The problem is whenever you turn the pump on, it mixes the water back up again.

It's not that there's not seepage water coming through that has essentially the same characteristics as the water in the – in Water Conservation Area 3A. It's the operation of the pump which mixes the water, the two different masses of water, back again, and puts water that shouldn't be going into the Everglades, there.

Q. You keep referring to it as two different water bodies, but one can contain water from the other, in fact?

A. Proportionally, I think we described the proportional portion of that, and that the issue is not – if this was a seepage return pump and all it was doing was returning seepage, we wouldn't be here, because there wouldn't be any [90] damage in the conservation area.

Q. Because the things that are causing the damage are the things that are coming from the basin? The pollution that's causing the damage is the pollution that's coming from the basin?

A. It originates in the basin, yes.

Q. Back to dissolved oxygen. Is that – is the level of dissolved oxygen that's being transferred from the C11 canal to the water conservation area, is that an element of concern?

A. No, not in my mind. The problem is that – what I see as a concern is that the phosphorus or the limiting nutrient, when you put these nutrients into the marsh, into the Everglades side, Water Conservation Area 3A side, that that causes an increase in metabolism, which causes a decrease in dissolved oxygen.

Q. The problem is the nutrient, not the dissolved oxygen concentrate of the water being absorbed by the S-9 pump?

A. The dissolved oxygen content just indicates different masses of water, different characteristics. It's another characteristic of that.



Q. When reading your expert witness [91] summary, one of the things in here is that you say the current operation of the S-9 harms the Everglades system by adding pollutants at the point of the S-9.

Can you define for me the operation that you are talking about, that harms the Everglades?

A. Sure. The back pumping of water under the current scenario, where there's a component of that water that is not just seepage. It's water originating in the C11 basin, that is – that contains elevated levels of, you know, phosphorus and nitrogen and pesticides and whatever else happens to be in there, Christmas trees, about this time of year. There will be a tremendous number of those floating down the canal.

* * *

[92] Q. Is there a difference in specific conductance between the C11 canal water and the water in the water conservation area?

A. Yes, there is.

Q. What's the difference?

A. The C11 canal water has a higher specific conductance, has more salts dissolved in it, than the conservation area.

Q. Is that a problem, putting higher specific conductance?

[93] A. It can be, particularly if it contains – sulfate or potassium are components of the specific conductance, if you will, or the – because those can cause alterations in the cycling of things like mercury and oxygen.

* * *

[97] Q. In looking at that, actually, do you know if the C11 canal is a water of the United States?

A. I can't see why it wouldn't be.

Q. And water conservation areas?

A. Certainly, the water conservation areas certainly are. They're both navigable waters.

* * *

[101] Q. What is your definition of a point source?

A. If you've got an end of a pipe that's discharging, I would consider that a point source, unless it's simply moving – moving identical waters from one place to another. Then it's just a transportation.

You have to be a source of something. If there's no difference between the water on one side of a structure and water on the other side of a structure, it's not a point anything, other than just a place where the water is being accelerated or perhaps moved in the opposite direction to natural flow.

Q. So, your definition has two compartments. If it's either a source of something, or it changes the flow of the water. Is that correct?

MS. CARROLL: Objection.

THE WITNESS: Not necessarily the flow of the water. I didn't say that.

I said if it changed the flow of the water, that doesn't necessarily make it a point source. Okay?



I said what made the difference is the quality of the water on the sides of the [102] structure. If one was adding something into – you could be a source of clean water and into a source of dirty water, and still be a point source. A point of source of different water.

BY MS. SOLE-CALAS:

Q. If this – let's call it a structure. If a structure moves exactly the same water from one side of the structure to another side of the structure, you are saying it's not a point source. Is that correct?

A. Yes. Just moving water or allowing water to pass.

Q. If the structure, though, adds something to the water from one side of the structure to the other side of the structure, then it's a point source?

A. You have that a little too defined to the structure. I didn't say that. I said if the structure points water of a different quality from one side to the other side, or moves it from one side to the other side, then it is a point source.

* * *

[103] Q. Do you think that the S-9 pump station is a point source?

A. Oh, yes. No doubt about it. It requires and NPDES permit.

Q. Can you tell me why the S-9 meets your definition of a point source?

A. Because it is pumping different waters. Not only different waters with different characteristics, but water against its natural [104] flow pattern. And it's a point. You

can go to the discharge point of the pump. You can go to the intake point of the pump. It meets every characteristic that I know of, of a point source.

Q. You said it's moving different water?

A. Right. The water quality, the water characteristics of the water in the C11 basin are not the same. It's different water than the water in the conservation area.

Q. The pump station itself is not transforming or changing the water quality of the water that's going through it?

A. Other than the point we pointed out about the sediments, resuspension of the sediments, and thereby the turbulent mixing that's in the pump itself would tend to cause increases, but no data on that. I don't think that's the issue, though. The pump station changing the water isn't –

Q. That's my question.

A. No. I do not believe the pump station itself. We talked about the oil, the – whatever it is, and you know, those metals that would be coming off of the pipes, or whatever that we have, but I mean it's not changing the water [105] itself. It's just pumping water that's different characteristic.

Q. What do you base your definition of point source on?

A. I don't –

MS. CARROLL: Objection, form.



BY MS. SOLE-CALAS:

Q. Do you understand the question?

A. Yes, I understand the question. I don't know how to go – I've read – I've read all the documents, you know. I've been dealing with this stuff for a long, long time.

Q. But what in particular?

A. NPDES documents, 401 permitting documents, Clean Water Act.

I worked for EPA for too many years not to have absorbed some of this stuff. So, I mean – but I can't put my finger on what it is. It's just general knowledge. I probably could go into my files and pull out any of those acts or regulations and look at the definitions of point sources, but – principally, you know, the point source is from – is moving water in an unnatural direction and it's moving water of a different characteristic, different quality, different [106] characteristic.

Q. When you say it's moving water in an unnatural direction, what do you mean by that?

A. The water is supposed to be going from west to east and the pump station, S-9, pumps from east to west.

Q. Why is it supposed to be going in that direction?

A. That's the natural gradient.

Q. After the canal was put in?

A. Sure.

Q. That's not the natural gradient without the structure?

A. There wouldn't be structures there. God didn't create the design or put the levees in there.

Look at the water going in the area. The water would have been moving towards – tide to the coast. It's higher in the Everglades. The water is always moving towards the coast and moving south down the system. But there's movement of water west to east naturally. There's movement of water now west to east. The pump station back pumps. You don't need to back pump if you are going in the natural direction. [107] The whole purpose of that is discharge, is returns, back pump. That's what it's doing.

* * *

A. You mean if there was no back pumping allowed, what would happen to the water levels in the conservation area?

Q. Yes.

A. You would get your pants sued off by the people living in the basin, but I guess the water levels would decrease in the conservation area.

You would get your pants sued off by the people living there, because there would be flooding in the C11 basin.

* * *

[108] Q. The source of the pollutants in this case, are the land uses and the activities in the C11 basin?

[109] A. The source is the water that's in the C11 basin, and the land uses are what, I guess, contributes – puts the pollutants in it.

* * *



[113] Q. But when you say that you are going to address the district's regulatory methods, what testimony do you anticipate regarding the district's regulatory methods?

A. Do you have any for that structure? The lack of regulation of anything to do with the [114] S-9 pump.

Q. So, your testimony is not going to be talking about the district's regulatory authority and permitting?

A. No, no.

Q. The permits it issues?

A. No. I don't do that. Just the fact that there doesn't appear to be any.

Q. I want to understand what you mean by these regulatory methods that the district has. Are you talking about –

A. For instance, there are Class III violations in this area, imbalances of flora and fauna. People have admitted that. They go out there and see it. Fine and dandy. But there's no action taking place to eliminate that.

Q. So, the approach that's being taken, for example, under the regulatory action strategy, which is to find the upstream contributors and clamp down on them, in your opinion isn't sufficient?

A. Yes, definitely.

Q. Are you familiar with that strategy?

A. I am very familiar with that strategy that has been presented to me now, which is BMPs [115] and some additional pumping practices or maybe some gates on the

culverts or water management. It's going to be inadequate, period.

It hasn't worked anywhere else to that extent. I wish it would. I wish it could, because it would be really inexpensive for us to solve our water quality problems in South Florida.

* * *

[117] A. Cattails are not going to be present if there's not elevated phosphorus. No phosphorus pollution, no cattail, no matter what the water level.

Q. You seem a little upset about this point. Is this a point you discussed earlier? What are your sentiments on this?

A. It's just the fact of the matter. You don't have cattails in places where you don't have elevated levels of phosphorus, period.

* * *

[119] Q. If the S-9 pump station is not pumping water into the water conservation area anymore, would this area dry out?

A. I doubt it.

Q. What would happen?

A. It would have less water in it and the C11 basin would flood.

* * *

[121] Q. I remember discussions about if there's not enough water coming to the park, we're going to have great changes in the flora, and we're not going to have bird



communities, et cetera, and those were some of the concerns I've heard, with lack of water.

I'm wondering if those same concerns would exist in the water conservation area?

A. I won that argument very early. I told them not to fix the problem with dirty water. The Everglades have been going through droughts [122] and floods for thousands of years, and they can handle that very, very well. The communities change and they respond, and the birds move in and the birds move out.

Certainly we've caused a lot of damage by shrinking the size of the Everglades and we do have hydrology as a major – the characteristic of what makes a wetland a wetland, but the system has quite a resilience to droughts and fires and frosts and those types of things.

It has very, very little resilience or resistance to phosphorus, because phosphorus is – has held on so tightly to the system that it affects it literally for hundreds of years, maybe thousands of years.

* * *

[136] Q. We've used the term, "back pumping." What is that, just for the record?

A. Water that's come out of the Everglades, or water that – it's kind of interesting.

Definitely, you would think of back pumping, the source of the water would be the Everglades, and then you take that water and put it back into the system, but it's often used as – for rainfall or water that would have been into the system and it's put back into the [137] Everglades, you know, so there's kind of a mixed use, and I don't know – without

going through each individual document and seeing how they use the term, you can – you have to temper it with that. Seepage water coming out, being back pumped, versus water that would have gone into the system being back pumped, are two different things.

Q. You said water that would have gone into the system, you mean water that would have been part of the Everglades system, that there was no canal or levee, the water would have been part of the Everglades system?

A. That's correct.

* * *

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**Deposition of Samuel Eugene Poole**
**December 22, 1998**

* * *

[39] Q. Are you familiar with the S-9 pump station?

A. Yes.

Q. It is a Water Management District structure; is that correct?

A. I don't know who has title to the structure. I believe that it is one that we hold title to, but I can't tell you.

Q. You operate and maintain it; is that [40] correct?

A. Yes.

Q. And it discharges into water conservation area 3-A; is that correct?

A. Yes.

* * *

[44] A. Well, the critical projects are moving very, very slowly. And in particular, the federal funding that we had been asking for has not been received. The required project cooperation agreements have been slow to be executed. In fact, I'm not sure that any have been executed to date. But the critical projects from the federal funding point of view have not been moving along as fast as we would like.

* * *

[58] Q. Now, the Water Management District is involved in Everglades restoration; is that correct?

A. Yes.

Q. And would it be fair to say that water conservation area 3-A is part of the Everglades; is that correct?

MR. MACLAUGHLIN: I'm going to object to [59] the form of the question. It's not really a question, it's a statement.

THE WITNESS: I'm not sure. You could treat it in a number of ways. Clearly it was part of the Everglades, and it operates as a part of the South Florida environmental system, and it's probably the best example of what the Everglades used to be pre-drainage, probably a better example than Everglades National Park.

BY MS. CARROLL:

Q. And it's part of the Everglades Protection Area; is that right?

A. Yes.

Q. So would it be fair to say that it is one of the responsibilities of the Water Management District to protect and preserve that kind of Everglades Protection Area like the water conservation area 3-A that I discussed?

MR. MACLAUGHLIN: Let me object. It seems to be asking for some sort of legal conclusion.

THE WITNESS: I was going to say that it's 373 that gives us our responsibilities, and 373 says that we are supposed to balance the four elements of water supply, flood protection, [60] water quality, and environmental protection and enhancement. So the job of this agency is to balance all four of those interests. Part of the area that we



operate in is water conservation area 3-A, and we are attempting to balance those interests.

* * *

Q. The Water Management District is obligated to comply with the requirements of the Clean Water Act though, right?

A. Certainly.

* * *

[84] Q. Are you aware that previously planned or projected regional treatment facilities for the area around the S-9 are no longer being pursued by the District?

* * *

A. One of the problems that we have witnessed is that when you have the pumps operating at full capacity, it entrains a lot of sediment, and that sediment carries with it a high phosphorus load.

* * *

[87] Q. Have you been out to the C-11 canal?

A. Yes.

Q. If you step back and look at it, is it something that's obviously a canal; does it have distinct boundaries and that sort of thing?

A. Sure, yes.

Q. And is there pollution in that canal?

* * *

THE WITNESS: That canal is in an area that used to be Everglades, and is no longer. I don't know what the background water quality was. No water quality measurements were made in that area before it was destroyed, so I don't know what the background would be.

[88] And I think probably the relevant part of your question is that when the water from that canal goes into the Everglades, we know that the water has more phosphorus in it than water out in the Everglades itself.

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**DEPOSITION OF RICHARD DREW**
**December 23, 1998**

* * *

[10] A. I am bureau chief, Bureau of Water Facilities Regulation, Division of Water Facilities, Department of Environmental Protection, located in Tallahassee, Florida.

* * *

[17] Q. Are you aware there is case law where waters of the United States to waters of the United States has resulted in a requirement of an NPDES permit?

A. This morning. I heard about that one particular case.

* * *

[19] Q. Are you familiar with the S9 pump station?

A. No.

Q. You are having to talk to me in isolation about the fact?

A. That's why I say site specific circumstances. I would have to look at the individual site. Early on you asked me what I would look at.

Q. Have you ever been to the S9 pump station?

A. No.

Q. Ever been to the C11 West Basin?

A. I probably have flown over it.

Q. You don't recall it specifically?

A. No.

Q. Florida Conservation Area 3A, have you ever been there?

A. Not that I remember.

* * *

[36] Q. Have you ever testified under oath in a court or some other hearing on the issue of whether a facility or structure should have an NPDES permit?

A. No, I have not.

* * *

[43] Q. The Stormwater Treatment Areas, most of them are being required to have NPDES permits; is that correct?

A. Yes.

* * *

[44] Q. So what are the pollutants that are being added?

A. I don't think there are any.

Q. So in your opinion –

A. I wouldn't permit them – would not.

Q. But EPA is requiring that they be permitted?

A. They sure are.

* * *

[48] Q. Were you around when the decision was made, were you involved in that decision making process on the STAs, whether or not they should have NPDES permits?



A. No, I work for DEP.

Q. Right, but my understanding from my discussions with you is that DEP and EPA had many discussions on this topic; is that correct?

A. Uh-hum.

Q. Were you involved in any of those discussions?

A. Yes, I was.

[49] Q. And it's fair to say you disagreed pretty strongly with EPA?

A. Yes, I did.

* * *

[67] Q. Okay. Typically how long does it take to process a permit application once application is made for an NPDES permit?

A. One would hope six months. We ask an application be provided – we ask for an application to be provided for renewal six months prior to the expiration date, with the target in mind that we would issue a permit prior to the six months time frame, it goes away.

We have certain notice requirements and things like that that have to be met. And for a new facility – and the reason I hesitate – for a new facility that comes in, there may be certain questions that have to be answered under a request for information.

That may take a while longer to do. For instance, the development of a water quality based effluent limit may require mathematical modeling, may require seasonal sampling, it could take anywhere from [68] one to two

years just for the facility to get the baseline information they need to file a complete application.

So we would deem it incomplete, which would freeze it until we receive the additional information from the consultant.

The consultant comes back with the information, we look at it, we run the model, we say you are using these types of coefficients, you shouldn't have, and go back and do it.

So it becomes a little – for newer facilities, it's a little difficult, or expansion of existing facilities because there are unknown, not because the department is sitting on a permit and taking a long time processing it, it's just to have a complete application, have all the information necessary to make a decision, may take a longer period of time from the very first time an application comes in the door.

If all the information is complete as it comes in the door, then I don't see any reason why the permit wouldn't be out in six months or even before that. General permits can be out in a matter of a couple of weeks.

Q. So –

[69] A. I am sorry to give you a long answer, but it was a complicated one to answer.

Q. Sure. So when you say – if you have all the information available up front, you mean like sufficient monitoring done and all the factual information about the facility in question?



A. Characterize the effluent, what the impacts are to the environment, whether it's protected for the designated use, all the information necessary for us to make decisions and write effluent limitations on there, on the permit. They may have given us everything we want except they don't tell us where they are going to dispose of the residuals, which is another way of saying municipal sludge.

We have to know where they are going to dispose of it. So that type of information. All that information has to be in there. These permits can be very complex.

* * *

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**PLAINTIFF MICCOSUKEE TRIBE'S MOTION AND INCORPORATED MEMORANDUM OF LAW FOR SUMMARY JUDGMENT ON ALL COUNTS OF TRIBE'S COMPLAINT**

**January 4, 1999**

* * *

**A. FACTS AS TO WHICH THERE IS NO DISPUTE.**

* * *

9. The S-9 is owned operated and maintained by the South Florida Water Management District. Affidavit of Truman Eugene Duncan at 2.

10. The S-9 is located in Broward County. Affidavit of Truman Eugene Duncan at 2.

11. The SFWMD is one of 5 water management districts in the State of Florida. Affidavit of Truman Eugene Duncan at 2.

12. Samuel Poole is the executive director of the SFWMD. Poole Depo at 6 (SFWMD employee).

13. Water from the C-11 Basin that is being discharged through the S-9 pump travels down the L-67 canal that has a direct connection to Everglades National Park. Affidavit of Bradley Waller at 2.

14. Everglades National Park is a 1.5 million acre International Biosphere Preserve, a World Heritage site and a wetland of international significance that is home to numerous threatened and endangered species. Affidavit of Truman Eugene Duncan at 2.



15. The Army Corps of Engineers has been authorized by Congress to construct the Modified Water Deliveries project to restore water to Everglades National Park through northeastern Shark River Slough. Affidavit of Truman Eugene Duncan at 2.

16. The project will involve creating gaps in the L-67 levee between WCA 3A and WCA 3B, thus opening up relatively pristine WCA 3B and Everglades National Park to polluted water from the S-9 pump. Affidavit of Truman Eugene Duncan at 2.

17. The C-11 West Basin is the subject of a Critical Restoration Project, of which the S-9 is a part. *See* Trost depo at 15-16 and 77 (SFWMD employee/witness); *see* Strowd depo at 63 (SFWMD employee/witness). That Critical Project is an element of the United States Army Corps of Engineers Re-study. *See* Trost depo at 15 and 76-77 (SFWMD employee/witness). It is in the top 5 of the Critical Projects list. *See* Trost Depo at 16 (SFWMD employee/witness).

18. Critical Projects were identified in part because there was a problem to be addressed in the Critical Project Area. Strowd depo at 65 (SFWMD employee/witness).

19. The problem to be addressed in the C-11 basin was the general water quality concern for water being discharged from C-11 into conservation area 3. Strowd depo at 65.

20. The C-11 critical project has not yet been implemented. *See* Strowd depo at 66 (SFWMD employee/witness).

21. One anticipated benefit of the critical project would be some benefit or improvement in phosphorus

loading to S-9 into conservation area 3, another would be to improve dissolved oxygen. *See* Strowd depo at 68 (SFWMD employee/witness).

22. The S-9 is a structure which discharges into the Everglades Protection Area. Ammon at 84-85 (SFWMD employee/witness); *see* Bechtel depo at 24 (SFWMD employee/witness).

23. The S-9 pump station discharges into Water Conservation Area 3A. *See* Trost depo at 32 (SFWMD employee/witness); *see* Strowd depo at 13 (SFWMD employee/witness).

24. The S-9 pump station does not have an NPDES permit. Trost depo at 32 (SFWMD employee/witness).

25. There are no pending applications for the S-9 to obtain an NPDES permit. Trost depo at 32 (SFWMD employee/witness).

* * *

27. Water Conservation Area 3A is a water of the United States. *See* Trost depo at 59 (SFWMD employee/witness). Affidavit of Bradley Waller at 4.

28. The intent of the Everglades program and the District is to meet water quality standards by the year 2006. *See* Trost depo at 62 (SFWMD employee/witness). According to the SFWMD, structures do not have to be in compliance until December 31, 2006. *See* Ammon depo at 40 (SFWMD employee/witness).

29. The district is trying to find out exactly what the sources of pollution are in the C-11 West Basin. *See* Trost depo at 69 (SFWMD employee/witness).



30. The Western C-11 is one basin. Trost depo at 71 (SFWMD employee/witness).

31. It contains other sub-basins. Trost depo at 71 (SFWMD employee/witness); Affidavit of Bradley Waller at 2.

32. The Water Conservation Areas are their own basins. Trost depo at 73 (SFWMD employee/witness). The Water Conservation Area 3A designation may be used interchangeably with basin. Ammon depo at 113 (SFWMD employee/witness); *see* Strowd depo at 37-38 (SFWMD employee/witness).

* * *

34. The direction of flow in the C-11 canal, when the S-9 is not operating, is from west to east. Trost depo at 74 (SFWMD employee/witness).

35. The S-9 backpumps water from the C-11 canal and delivers it into the conservation Areas. Ammon depo at 53 (SFWMD employee/witness).

36. When the S-9 pump station is turned on it discharges water from the C-11 canal into Water Conservation Area 3A. Ammon depo at 62 (SFWMD employee/witness).

37. Water in the C-11 canal is added to Water Conservation Area 3A by the S-9 structure during operation of the pump. Trost Depo at 78 (SFWMD employee/witness). The S-9 adds water from outside the Water Conservation Area 3A. *See* Ammon at 62 (SFWMD employee/witness).

38. There are water quality problems in the Everglades Protection Area. *See* Ammon depo at 14 (SFWMD employee/witness); *see* Affidavit of Dr. Ronald Jones.

39. In the C-11 West Basin the SFWMD is proceeding like there is a water quality problem there. Ammon depo at 28 (SFWMD employee/witness).

40. Nutrients, in particular, have been identified as a concern for inflows at the Everglades Protection Area. Ammon depo at 44 (SFWMD employee/witness).

41. Nutrients have specifically been identified in the Everglades Forever Act as a concern. Ammon depo at 44 (SFWMD employee/witness). Different chemical parameters other than nutrients could also affect the Everglades. *See* Ammon depo at 44 (SFWMD employee/witness).

42. The C-11 and the Everglades are separate bodies of water. *See* Affidavit of Bradley Waller at 2; Affidavit of Dr. Ron Jones at 5.

* * *

46. The S-9 has been sampled at phosphorus levels higher than natural background. *See* Bechtel depo at 52 (SFWMD employee/witness).

* * *

48. If the S-9 is not operating, water in the C-11 typically does not discharge to Water Conservation Area 3A. Bechtel depo at 29 (SFWMD employee/witness).

49. If the S-9 is operating, then water from C-11 canal discharges to Water Conservation Area 3A. Bechtel depo at 30 (SFWMD employee/witness).

50. There are exceedences above the water quality criteria for constituents other than phosphorus at the S-9, including exceedences for dissolved oxygen (DO) over 96



percent of the time and detections for pesticides. Bechtel depo at 56-57 and 87-89 (SFWMD employee/witness).

51. Running of pumps generally increases turbidity. Bechtel depo at 57 (SFWMD employee/witness).

* * *

56. The S-9 has the 7th highest load of phosphorus of structures discharging into the Everglades Protection Area and the 5th highest load for total nitrogen. Bechtel depo at 111 (SFWMD employee/witness).

57. There is no numeric standard set for phosphorus. Bechtel depo at 141 (SFWMD employee/witness). However, there is a default numeric standard of 10 ppb if rule making has not been instituted by a certain date in the future. Bechtel depo at 142 (SFWMD employee/witness).

58. In general terms when the canal gets to 4 feet above sea level or above, then S-9 pump station is operated, and then when it returns to sea level, the pump station operation is stopped. Strowd depo at 12 (SFWMD employee/witness); *See* Affidavit of Bradley Waller at 3.

59. The regulation schedule for the S-9 allows anticipatory draw down also. Strowd depo at 13 (SFWMD employee/witness).

60. The water in C-11 generally discharges to the east if the S-9 isn't operating and if the S-13A is opened. Strowd depo at 25 (SFWMD employee/witness); *see* Affidavit of Bradley Waller at 2.

61. The S-9 pumps water in the C-11 canal out of that basin. Strowd depo at 37 (SFWMD employee/witness). All of the South Florida Water Management District is hydrologically connected. Strowd depo at 41 (SFWMD employee/witness).

62. There are some, water quality constituents that are issues in the area. Strowd depo at 47 (SFWMD employee/witness).

63. There are three pumps at the S-9. Strowd depo at 50 (SFWMD employee/witness); Affidavit of Bradley Waller at 3.

64. Each one of the pumps can pump 960 cubic feet per second. Strowd depo at 50 (SFWMD employee/witness); *see* Affidavit of Bradley Waller at 3.

65. There are three pipes on the west side of the S-9. Strowd depo at 51 (SFWMD employee/witness). The water discharges out of those three pipes. Strowd depo at 51 (SFWMD employee/witness).

66. If you do not run the any of the three S-9 pumps, the water does not go out of those pipes. Strowd depo at 51 (SFWMD employee/witness).

67. If you just operate one of those pump structures, the water just discharges from one of the points/pipes. Strowd depo at 59 (SFWMD employee/witness).

68. The engines the run the S-9 pumps are effectively large bull dozer engines. *See* Strowd depo at 81 (SFWMD employee/witness).

69. Construction of the S-9 was completed in 1957. Strowd depo at 84 (SFWMD employee/witness); *See* Affidavit of Bradley Waller at 3.

70. The C-11 canal collects water from various sources. Strowd depo at 32-33 (SFWMD employee/witness); *see* Affidavit of Bradley Waller at 3-4.



71. Looking at the C-11 canal allows easy identification. *See* Strowd depo at 33 (SFWMD employee/witness).

72. The S-9 pump discharges polluted water into Water Conservation Area 3A, a jurisdictional Water of the United States, which is owned by the State of Florida and perpetually leased to the Miccosukee Tribe of Indians of Florida, without an NPDES permit. Affidavit of Dr. Ron Jones at ____. The water exiting the S-9 contains pollutants in concentrations not naturally found in the receiving waters. The principle pollutant of concern which the S-9 adds to the Water Conservation Area is phosphorous, though other constituents are also of concern. The Everglades is a phosphorous-limited system, in which concentrations of phosphorous in water above natural background levels cause imbalances in natural populations of aquatic flora and fauna. The S-9 is a critical project, for which there are immediate clean-up options. Affidavit of Dr. Ron Jones at 1.

73. The Everglades is an oligotrophic wetlands system which is phosphorus-limited. and phosphorus sensitive. The level of phosphorus is the defining chemical characteristic of the system in that the exhaustion of the available phosphorus limits the type and distribution of aquatic flora and fauna, and the addition of phosphorus above natural levels causes an imbalance in flora and fauna. Affidavit of Dr. Ron Jones at 2.

74. The Everglades has some characteristics of ultra-oligotrophic systems, which are even more phosphorus limited and phosphorus sensitive than oligotrophic systems. Affidavit of Dr. Ron Jones at 2-3.

75. Phosphorus is a nutrient. The addition of a nutrient to a biological system in which the nutrient is a

limit causes additional growth until the nutrient supply is exhausted or another limiting element is exhausted. Affidavit of Dr. Ron Jones at 3.

76. The addition of phosphorus to a phosphorus limited system, such as an oligotrophic system or ultra-oligotrophic system (i.e., like the Everglades) causes additional growth and an imbalance in natural aquatic flora and fauna. Affidavit of Dr. Ron Jones at 3.

77. A phosphorus-limited system cannot receive additional phosphorus beyond natural levels without causing additional growth beyond natural levels. Affidavit of Dr. Ron Jones at 3.

78. The oligotrophic conditions of the Everglades were recognized by the Florida Department of Environmental Protection and the South Florida Water Management District in the 1992 Settlement Agreement and Consent Decree in case number 88-1886-CIV-HOEVELER. The Consent Decree states that "The nutrient-lean (oligotrophic) condition of the aquatic ecosystem is one hallmark characteristic of the unspoiled Everglades that still exists in the Park, the Refuge and other parts of the Everglades. These ecosystems are changed by even slight increases in nutrient concentrations, particularly increases in the concentration of phosphorus." Affidavit of Dr. Ron Jones at 3.

79. The condition of the Everglades as a phosphorus-limited oligotrophic system is commonly recognized. For example, the phosphorus limitations and sensitivity of the Everglades was recognized in the Everglades SWIM Plan drafted by the South Florida Water Management District. Affidavit of Dr. Ron Jones at 3.



* * *

81. There is an imbalance of flora and fauna occurring in the receiving waters of the S-9. Affidavit of Dr. Ron Jones at 4.

82. The presence of cattail and increased biomass of sawgrass and other more common native Everglades plants can be found in the area receiving waters from the S-9. *See* Affidavit of Dr. Ron Jones at 4.

* * *

84. Much of the water comes from the C-11 canal, which is an external source of pollutants to the Everglades, a separate water body and of significantly different water quality than the Everglades. The canal water is generated from various different sources with various levels of quality. Affidavit of Dr. Ron Jones at 5.

85. The C-11 canal and WCA 3A are very different waters with different characteristics. In general, the C-11 canal has a much lower quality of water than the unimpacted Everglades. Affidavit of Dr. Ron Jones at 5.

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AFFIDAVIT OF TRUMAN E. DUNCAN, JR.

STATE OF FLORIDA )
) ss.
COUNTY OF MIAMI-DADE )

I, Truman Eugene Duncan, Jr., being duly sworn, do depose and state:

1. I am employed by the Miccosukee Tribe of Indians of Florida ("Tribe", "Tribal") as the Tribe's Water Resources Director and have held this position since 1988. I hold a Masters of Science degree in Geology. As the Tribe's Water Resources Director, I represent the Tribe on all scientific committees which relate to the environment in general and to the Everglades in particular. I am authorized to execute this affidavit on behalf of the Tribe.

2. This affidavit is based on my personal knowledge of the facts and matters stated herein.

3. The Miccosukee Tribe of Indians of Florida is a federally-recognized Indian Tribe.

4. For generations, the Tribe and its members have resided and worked within the Florida Everglades.

5. The Tribe has land interests lying within the Florida Everglades, including a perpetual lease to most of Water Conservation Area 3A, and its way of life is dependent upon the natural Everglades.

6. The way of life of the Tribe and its members, including their religious, cultural, economic, and historical identity, is based upon the Everglades ecosystem and upon preservation of the Everglades in its natural state, including but not limited to the quantity and quality of Everglades waters.

7. The Tribe and its members rely upon the Everglades in its natural state to support their religious, subsistence and commercial activities.

8. The Tribe's religious activities traditionally include the planting and harvesting of corn on tree islands in the Everglades.



9. The Tribe's subsistence activities include gathering of materials, hunting, and fishing within the Everglades.

10. The Tribe's commercial activities include frogging, conducting airboat and other guided tours, and providing recreational and tourism facilities within the Everglades.

11. The S-9 is owned operated and maintained by the South Florida Water Management District.

12. The S-9 is located in Broward County.

13. The SFWMD is one of 5 water management districts in the State of Florida.

14. Everglades National Park is a 1.5 million acre International Biosphere Preserve, a World Heritage site and a wetland of international significance that is home to numerous threatened and endangered species.

15. The Army Corps of Engineers has been authorized by Congress to construct the Modified Water Deliveries project to restore water to Everglades National Park through northeastern Shark River Slough.

16. The project will involve creating gaps in the L-67 Levee between WCA 3A and WCA 3B, thus opening up relatively pristine WCA 3B and Everglades National Park to polluted water from the S-9 pump.

17. Water from the C-11 Basin that is being discharged through the S-9 pump travels down the L-67A canal that has a direct connection to Everglades National Park.

18. The C-11 West Basin is the subject of a Critical Restoration Project, of which the S-9 is a part. That Critical Project is an element of the United States Army Corps of Engineers Re-study. It is in the top 5 of the Critical Projects list.

19. The S-9 pump station discharges from the C-11 canal into Water Conservation Area 3A.

20. Water Conservation Area 3A is a water of the United States.

21. When the S-9 pump station is turned on it discharges water from the C-11 canal into Water Conservation Area 3A.

22. Water in the C-11 canal is added to Water Conservation Area 3A by the S-9 structure during operation of the pump. The S-9 adds water from outside the Water Conservation Area 3A.

23. Nutrients have specifically been identified in the Everglades Forever Act as a concern. Different chemical parameters other than nutrients have also been identified as potential concern in the Everglades.

FURTHER AFFIANT SAYETH NAUGHT.

_____

Truman Eugene Duncan, Jr.

**WITNESS** my hand and official seal in the County and State last aforesaid this 4th day of January, 1999.

_____



Affidavit of Bradley G. Waller

Miccosukee Tribe of Indians v. SFWMD

1. The historic flow of water in the South New River Canal was from the Everglades eastward to the ocean.

2. After the inception of the Central and Southern Florida Corps of Engineers project in 1949, numerous changes were made in the management of water levels and flow in the South New River Canal. Levees 33 and 37, part of the continuous North-South Levee, completed in 1956, effectively separated the western 8-mile segment of the canal in Water Conservation Area 3A (WCA 3A) from the eastern segment. Pump station 13, at the eastern end of the C-11, which serves primarily as a salinity-control structure, was completed in 1954 and became the eastern terminus of the freshwater section of the canal. This structure, located just west of U.S. Highway 441 (State Road 7), is designed to pump water into the tidal reach of the canal and also contains gates to release excess water eastward by gravity discharge. Structure 13 A constructed in 1956, in an earthen dam 4.5 miles west of S-13. This structure and dam divide the South New River Canal into two distinct drainage reaches. One reach drains to the east through S-13 and the other to the west by back-pumping at pump station 9 (S-9). Only occasionally, during periods of high water, are the S-13A gates opened to drain eastward.

3. Water from the C-11 Basin that is being discharged through the S-9 pump travels down the L-67A canal that has a direct connection to Everglades National Park.

4. The Western C-11 is one basin.

5. The S-13 A is a divide structure in the C-11 canal that divides the C-11 West Basin from the C-11 East Basin.

6. The direction of flow in the C-11 canal, when the S-9 is not operating, is from west to east.

7. The S-9 backpumps water from the C-11 canal and delivers it into the conservation areas.

8. When the S-9 pump station is turned on it discharges water from the C-11 canal into Water Conservation Area 3A.

9. Water in the C-11 canal is added to Water Conservation Area 3A by the S-9 structure during operation of the pump. The S-9 adds water from outside the Water Conservation Area 3A.

10. If the S-9 is operating then water from the C-11 canal discharges to Water Conservation Area 3A.

11. Pump station S-9, completed in 1957, is located between L-33 and L-37 at the eastern edge of Conservation Area 3. The S-9 is owned operated and maintained by the South Florida Water Management District. The S-9 is located in Broward County.

12. Operational criteria have been established for the structures located on the South New River Canal. The western part of the basin is maintained at an elevation of 4.0 MSL primarily by backpumping into WCA 3A at S-9 or occasionally by low volume gravity drainage at S-13A. Pump station S-9 has three large pumps with a combined capacity of about 2700 cubic feet per second.



13. Records of discharge and water levels for pump station S-9 have been maintained by both the US Geological Survey and the SFWMD. The period of record for this station dates back to 1958. Over the years, hundreds of thousands of acre-feet of water have been pumped into Water Conservation Area 3A via S-9. Since 1970, water levels have been maintained below 4.25 feet nearly 98 percent of the period of record (*see* attached figure 1). Since 1992, there has also been a noticeable increase in the volume of discharge entering WCA 3A via S-9 backpumping (*See* attached figure 2).

14. The sources of water being backpumped at S-9 are highly varied and dependent on hydrologic conditions in the basin. A large component of the backpumped water is from seepage return through the levees from WCA 3A. Additional contributors to the water backpumped by the S-9 include direct surface water discharge, induced groundwater flow, urban stormwater runoff, agricultural runoff, leachate from the Davie Landfill and to a minor extent direct rainfall among potentially others. All these components enter the South New River Canal and are discharged into WCA 3A via S-9 as a point source.

15. The operational criteria for the S-9 pump station has basically remained the same since 1957. Over the years pumping at S-9 has increased. With increased pumping and discharge by the S-9 comes additional loads of chemical constituents some of which harm the ecology of WCA 3A.

16. Protection of the WCA 3A environment from increased pumpage at S-9 is of utmost concern. WCA 3A is a navigable water of the United States, as federal statutes contemplate those terms.

17. The physical disturbance (increased velocity) caused by pumping the C-11 canal resuspends sediments that would under gravity discharge remain in bottom material, thus adding to the pollutant load discharged via S-9. Running of pumps generally increases turbidity.

Expert Qualifications

18. I have been working in the Everglades basin and adjacent areas as a professional hydrologist since 1972. My experience, qualifications and publications are summarized in my curriculum vitae included as attachment 3. I am extremely familiar with the operation of backpumping station S-9 and the western South New River Canal (C-11) basin. I began working in this basin in 1972, and in 1976 and 1981, I completed technical investigations in the basin for the US Geological Survey. Since I entered private industry, I have completed hydrologic projects at the Florida Wetlandsbank and Sunset Lakes and was involved as an expert witness in the Miller/Calder and Tomayo land condemnation cases, in the southwest Broward area. I have been qualified as an expert witness a number of times on cases related to the hydrology and water quality in South Florida, including cases involving the definition of navigable water of the United States.

FURTHER AFFIANT SAYETH NAUGHT.

_____

Bradley G. Waller

**WITNESS** my hand and official seal in the County and State last aforesaid this 4th day of January, 1999.

_____



## AFFIDAVIT OF DR. RON JONES

### I. Summary

1. The S-9 pump discharges polluted water into Water Conservation Area 3A, a jurisdictional Water of the United States, which is owned by the State of Florida and perpetually leased to the Miccosukee Tribe of Indians of Florida, without an NPDES permit. The discharged water contains pollutants in concentrations not naturally found in the receiving waters. The principle pollutant of concern which the S-9 adds to the Water Conservation Area is phosphorous, though other constituents are also of concern. The Everglades is a phosphorous-limited system, in which concentrations of phosphorous in water above natural background levels cause imbalances in natural populations of aquatic flora and fauna. The current operation of the S-9 harms the Everglades system by adding pollutants at the point of the S-9. The Everglades is harmed by continued delay. The S-9 is a critical project, for which there are immediate clean-up options.

### II. Expert Qualifications

2. I am a full Professor of Biology and the Director of the Southeast Environmental Research Program at Florida International University. I have a Ph.D. in microbiology.

3. My education, experience and research work qualify me as a water quality expert, including water quality in wetland systems (especially oligotrophic systems, such as the Florida Everglades), general Everglades ecology and as an expert in Everglades water in general.

4. I have studied Everglades water quality for over thirteen years, and I have been involved in water quality analysis for over nineteen years.

5. I have been qualified in federal court (Southern District of Florida) as a water quality expert and have testified on water quality and related matters.

6. I have been qualified in federal court as an expert in wetlands and wetlands delineation.

7. I have been qualified in federal court as an expert in Everglades water, generally.

8. I have been qualified in federal court as an expert in Everglades ecology.

9. I served as a federal government expert on Everglades water quality in the federal Everglades case (filed in 1988), both before, during and after the signing of the settlement agreement in 1991 and its judicial approval in 1992.

10. I live in the C-11 Basin within 7 miles of the S-9, and I am very familiar with the S-9, its operation and the surrounding area.

11. Additional indication of my expertise are indicated in the attached curriculum vitae. (Attachment 1)

The Everglades as a Phosphorous-Limited System

12. The Everglades is an oligotrophic wetlands system which is phosphorous-limited and phosphorous sensitive. The level of phosphorous is the defining chemical characteristic of the system in that the exhaustion of the available phosphorous limits the type and distribution



of aquatic flora and fauna, and the addition of phosphorous above natural levels causes an imbalance in flora and fauna.

13. The Everglades has some characteristics of ultra-oligotrophic systems, which are even more phosphorous limited and phosphorous sensitive than oligotrophic systems.

14. Phosphorous is a nutrient. The addition of a nutrient to a biological system in which the nutrient is a limit causes additional growth until the nutrient supply is exhausted or another limiting element is exhausted.

15. The addition of phosphorous to a phosphorous-limited system, such as an oligotrophic or ultra-oligotrophic system (i.e., like the Everglades) causes additional growth and an imbalance in natural aquatic flora and fauna.

16. A phosphorous-limited system cannot receive additional phosphorous beyond natural levels without causing additional growth beyond natural levels.

17. The oligotrophic conditions of the Everglades were recognized by the Florida Department of Environmental Protection and the South Florida Water Management District in the 1992 Settlement Agreement and Consent Decree in case number 88-1886-CIV-HOEVELER. The Consent Decree states that "The nutrient-lean (oligotrophic) condition of the aquatic ecosystem is one hallmark characteristic of the unspoiled Everglades that still exists in the Park, the Refuge and other parts of the Everglades. These ecosystems are changed by even slight increases in nutrient concentrations, particularly increases in the concentration of phosphorous."

18. The condition of the Everglades as a phosphorous-limited oligotrophic system is commonly recognized. For example, the phosphorous limitations and sensitivity of the Everglades was recognized in the Everglades SWIM Plan drafted by the South Florida Water Management District.

19. I am a principle investigator for the United States Environmental Protection Agency on their Regional Ecosystem Monitoring and Assessment Program ("REMAP") for the Everglades. In that capacity, I have analyzed numerous samples of water and soil from the vicinity of the S-9. In addition, I have observed the area from both the air and on the ground. The results of our studies, these observations and other studies indicate that the areas surrounding the S-9 pump is highly degraded/polluted due to the input of excess nutrients, particularly phosphorous, from the pump.

Irreparable Harm at the S-9 Structure

20. There is an imbalance of flora and fauna occurring in the receiving waters of the S-9.

21. That imbalance is evidenced principally by the presence of cattail and the increased biomass of sawgrass and other more common native Everglades plants.

22. Delay in correcting the water quality problems associated with discharges from the S-9 pump will continue to perpetuate the imbalance of flora and fauna.

23. The effect of continued delay will be continued destruction of the Everglades. Those portions of the Everglades directly affected will be biologically destroyed irreparably. Areas not directly affected are harmed by the



loss of the affected Everglades habitat, so that reduction in the size of the natural Everglades areas adversely affects remaining portions, particularly lands of importance to the Miccosukee Tribe.

24. The destruction caused by excess phosphorous in the Everglades is not easily reversed and for all practical purposes is irreversible. The only known mechanism for restoration is the physical removal of phosphorous from the system.

25. There is substantial evidence that there are actions that could be taken that could alleviate the continued destruction of this area.

26. Pollution discharged by the S-9 into the Everglades is not limited to phosphorous. In fact, for example, I have seen machines used for removal of aquatic vegetation which appear to expose petroleum products to the water which is to be discharged. However, the potential impacts from those other pollutants are masked by the overwhelming impacts of excessive phosphorous.

Sources of Pollutants and Pollutant Transport

27. I have significant knowledge regarding the sources and kinds of pollutants being introduced into the Everglades by discharges from the S-9.

28. Water and pollutants which would otherwise flow to the east, are added to the Everglades by way of the SFWMD's operation of the S-9 point source.

29. Much of the water comes from the C-11 canal, which is an external source of pollutants to the Everglades, a separate water body and of significantly different

water quality than the Everglades. The canal water is generated from various different sources with various levels of quality.

30. The C-11 canal and WCA 3A are very different waters with different characteristics. In general, the C-11 canal has a much lower quality of water than the unimpacted Everglades.

WHEREFORE, the S-9 Should be required to have an NPDES permit.

I, Dr. Ronald D. Jones, being duly affirmed, do depose and state:

FURTHER AFFIANT SAYETH NAUGHT.

_____

Dr. Ronald D. Jones

**WITNESS** my hand and official seal in the County and State last aforesaid this 4th day of January, 1999.

_____



**Affidavit of Tommy B. Strowd, Jr.**

1. I am the Director of the Operations Division for South Florida Management District. I have held this position for 1.5 years. I have been employed by the South Florida Water Management District for 6.5 years.

2. I am a Professional Engineer and have a bachelor's degree in oceanographic technology from Florida Institute of Technology, Melbourne, Florida, in 1976.

3. I have been working in and familiar with the Army Corps of Engineers Central and South Florida Flood Control Project for 6.5 years.

4. I have previously been qualified as an expert in court in the areas of Civil Engineering and Water Resource Engineering.

5. The South New River Canal, was dug in the early 1900's to drain the area of Broward County in the Everglades to the east. The canal joined the Miami Canal in the west to the tide waters in the east.

6. Prior to 1954, the typical flow in the South New River canal was to the east, although water in the canal could flow east or west depending on respective water levels in the area and rainfall.

7. The Center and South Florida Flood Control (C&SF) Project began in 1948. The Project encompassed the area of the historical Everglades that began in the Butler Chain of lakes and continued southward through the Kissimmee River, into Lake Okeechobee and into south Florida ending at Florida Bay. The project included construction of numerous levees and canals and creation of water impoundment areas known as water conservation areas.

8. Water Conservation Area 3A is one of the water impoundments created by the Army Corps of Engineers under the C&SF Project.

9. Historically water traveled as sheet flow from the overflowing southeastern rim of Lake Okeechobee in a broad arc generally towards the south and then southwest. There were isolated natural outlets for the sheet flow through narrow depressions in the coastal ridge that separated the sheet flow from tide.

10. The C-11 Project is the portion of the Army Corps of Engineers' C&SF Project that specifically covered the areas of the C-11 basins and C-11 canal. The C-11 Project included improvement of the existing South New River Canal (named the C-11 Canal), construction of the S-9 pump station, the S-13A divide structure and the S-13 structure in the South New River Canal/C-11 Canal, and creation of Water Conservation Area 3A by the erection of levees, including Levees 33 and 37.

11. One purpose of the C-11 Project was to improve the South New River Canal to flow west to work in conjunction with the S-9 pump station and the S-13A divide structure.

12. The C-11 West basin and the S-9 pump station are in an area that was historically part of the Everglades. Prior to the implementation of the C&SF Project, the water in this particular area generally sheet flowed as one water body in a southerly direction.

13. L-33 and L-37 Levees were constructed between 1954 and 1959 to create and separate the water conservation areas from the remaining land area. The S-9 pump station moves water in the C-11 canal from outside Water Conservation Area to 3A to within Water Conservation Area 3A. The earthen levees do not prevent seepage from the water conservation area to



the east. The C-11 canal and other canals capture this seepage and it is returned to the Water Conservation Area through the operation of the S-9 pump station.

14. The S-9 pump station was constructed in the period between 1954 and 1959 in the existing C-11 canal. The S-9 structure consists of three pumps each with the capacity to pump 960 cfs. The main function of the S-9 pump station is to move water in C-11 canal about 60 feet, from the canal on the east side of the structure to the same canal on the west side of the structure. The purposes of the S-9 pump station include regional water supply and flood control for the C-11 west basin. It also returns seepage from Water Conservation Area 3A.

15. The sources of water entering the S-9 pump station are seepage from the Water Conservation Area and stormwater runoff from the C-11 west basin. Both sources were part of the historical everglades as the stormwater in the canal falls in an area that was historically Everglades.

16. The area east and west of the L-33 and L-37 levees forming the water conservation area are hydrologically connected. Even without use of the S-9 pump station, water travels as seepage between of the water conservation area and the C-11 west basin.

17. If the S-9 pump station is not operated in accordance with the design criteria, seepage water from the water conservation area could flood the C-11 west basin within a matter of days.

18. The C-11 west basin today contains urban and agricultural land uses with a large amount of residential areas.

19. I have read the foregoing affidavit and each and every statement contained herein is true and correct.

FURTHER AFFIANT SAYETH NAUGHT

_____

TOMMY B. STROWD, JR.
DIRECTOR, OPERATIONS DIVISION

Witness my hand and official seal in the State and County last aforesaid this 4th day of January, 1999

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**DEFENDANTS' STATEMENT OF UNDISPUTED FACTS FOR CASE NOS. 98-6056 AND 98-6057**

**January 4, 1999**

1. The State of Florida Department of Environmental Protection has been authorized by EPA to issue state permits under Section 403.0885, Florida Statutes, in lieu of federal NPDES permits in the State of Florida, other than NPDES stormwater permits and permits for federal facilities. Deposition of Richard Drew, December 23, 1998, at pages 10 and 11.

2. The S-9 pump facility sits directly in the C-11 canal. It pumps water through three 960 cfs pumps from the canal on the east side of the structure to the canal on the west side of the structure. Affidavit of Tommy Strowd, Jr., Jan. 4, 1999; Affidavit of George Horne, December 24, 1998.

3. The canal on both sides of the S-9 structure is a navigable water of the United States as that term is used in the Clean Water Act. Deposition of Bradley Waller, December 8, 1998, pages 84, 85.

4. Without pumping at the S-9 facility, water to the east of the structure would generally flow to the east, although water in the C-11 canal could also flow to the west depending on weather conditions. Affidavit of Strowd; Deposition of Waller at 75.

5. Water passing through the three 960 cfs pumps does not come in contact with any substances other than the inside of the pump and the impellers, both made out of stainless steel, carbon steel, and concrete. The pumps are water lubricated. Pollutants that have been detected passing through the S-9 facility are not from the three S-9 pumps. Affidavit of Horne.

6. The S-9 pump station is permitted by the State of Florida Department of Environmental Protection

under Section 373.4592(9)(k) and (l), Florida Statutes. This permit requires the District to analyze water quality in the area of the S-9 structure and then systematically identify sources of pollution in the C-11W Basin and eliminate the non-point sources of pollution through the District's regulatory authority as set forth in Chapter 373, Florida Statutes. The permit and related statute requires that the S-9 pump station discharge meet all state water quality standards by no later than December 31, 2006, including meeting the state water quality standard for phosphorus which will be established by December 31, 2003. Affidavit of Sharon Trost, January 4, 1999

7. The Bureau Chief of the Bureau of Water Facilities Regulation, Division of Water Facilities of the State of Florida Department of Environmental Regulation, states that merely transferring water from one water of the United States to another water of the United States does not need an NPDES permit. Deposition of Drew pages 15, 16, 25-27, 36, 37, 138, 139.

8. Originally all of the area surrounding the S-9 structure (the C11-W Basin and Water Conservation Area 3A) was a part of the Everglades. Water flowed as a sheet flow throughout the area in a southerly direction as one water body. Affidavit of Strowd; Deposition of Waller pages 45-48.

9. In the early 1900's the South New River Canal was dug to drain to the east the area of Broward County located in the Everglades. Although the flow in the canal was typically to the east, water in the canal could flow east or west depending on respective water levels in the area and depending on rainfall location. Affidavit of Strowd, Deposition of Waller page 75.

10. During the 1950's the S-9 pump station was placed in the South New River Canal. The S-9 pump station



pumps water from the canal at the east side of the structure to the canal on the west side of the structure. Affidavit of Strowd.

11. Also during the 1950's, L-33 and L-37 Levees were constructed to create and separate the water conservation areas from the remaining land area to the east. The C-11 canal (formerly the South New River Canal) was improved and widened east of the S-9 pump station. The construction of the S-9 pump station, Water Conservation Area 3A, and the improvements to the C-11 canal were all done as part of the Central and South Florida Flood Control Project begun in 1948 by the U.S. Army Corps of Engineers. The purpose of this construction was to improve drainage and provide flood protection and regional water supply. Affidavit of Strowd.

12. The water bodies west of the S-9 structure and L-33 and L-37 Levees and the areas to the east of these structures are hydrologically connected. Seepage occurs through the levees toward the east and is returned to the Water Conservation Area by the C-11 canal and other canals and the operation of the S-9 pump station. Affidavit of Strowd; Deposition of Waller page 114.

13. If the S-9 pump station is not operated according to its schedule, seepage water from the water conservation areas would flood the C11-W Basin. Affidavit of Strowd.

14. The District does not have, nor has it been required to obtain, a state or federal NPDES permit for the discharge from the S-9 pump station. Miccosukee Tribe of Indians of Florida Complaint, Paragraph 23, Friends of the Everglades Complaint, Paragraph 13; Deposition of Drew page 15.

**Additional Statement of Undisputed Facts**
**For Friends of the Everglades**
**Case No. 98-6057**

The conclusively established and undisputed facts[1] that form the basis for this Motion for Summary Judgment against the Friends of the Everglades are as follows:

1. The S-9 pump station is a flow diversion facility conveying water in the C-11 canal to within WCA 3A.

2. The S-9 pump station and its operation by the District do not add any pollutants to the water it conveyed.

3. The pollutants in the water conveyed by the S-9 pump station were introduced into the water before passing through the S-9 pump station.

4. The pollutants in the water passing through the S-9 pump station are a result of the C-11 West Basin discharge.

5. The C-11 canal is a navigable water of the United States.

6. In contravention of their complaint, the Friends have specifically admitted that neither the S-9 pump

[1] On August 25, 1998 the Defendants served Requests for Admission on the Friends of the Everglades. The Friends have failed to respond to the Requests within the prescribed time period, which expired on September 24, 1998. As such, the requests are deemed admitted pursuant to F.R. Civ. P. 36(a). These admissions conclusively establish undisputed facts that may form the basis for granting this Motion for Summary Judgment in favor of the Defendants. *See, United States v. 2204 Barbara Lane*, 960 F.2d 126 (11th Cir. 1992); *see also, Stubbs V. Commissioner of Internal Revenue Service*, 797 F.2d 936 (11th Cir. A986).



station nor the District add heavy metals, pesticides, phosphorous, nutrients, or unionized ammonia to the water conveyed by the S-9 pump station.

7. The S-9 pump station and the District are not the cause in fact of the pollutants in the water conveyed by the S-9 pump station.

8. Prior to the Central and South Florida Project, the area around the C-11 basin was all part of the Everglades watershed and the water flowed generally in a southerly direction as one broad, shallow sheet flow.

* * *

## AFFIDAVIT OF SHARON M. TROST

* * *

3. In my position I oversee the Everglades Stormwater Program. This program is designed to analyze water quality at the structures that convey water into the Everglades Protection Area to determine if there are parameters of concern, then systematically move into the drainage basin, identify the source of pollutants, and eliminate the pollutants through the District's regulatory measures, and eventual water quality treatment facilities, if necessary.

4. The Everglades Stormwater Program is the implementation of the Regulatory Action Strategy (Exhibit 1), a condition of the permit issued to the District by the Department of Environmental Protection pursuant to the Everglades Forever Act, §373.4596.(9)(k) and (l) Fla. Stat. (1994), also known as the Non-ECP Permit. (Exhibit 2)

5. The S-9 pump station is one of the structures covered by the Non-ECP Permit and thus falls within the Everglades Stormwater Program.

6. In addition to meeting the requirements of the Everglades Stormwater Program, the Everglades Forever Act and the Non-ECP permit requires that the S-9 pump station discharge meet all state water quality standards no later than December 31, 2006. This includes meeting the numerical state water quality standards for phosphorous which will be established by December 31, 2003.

7. The sources of water to the western C-11 canal which flows into the S-9 pump station are primarily non-point sources of water. Those non-point sources are subject to the regulatory authority of the South Florida Water



Management District. Any point sources in the C-11 Western Basin would be regulated through the Department of Environmental Protection.

8. In addition to the Everglades Stormwater Program, the S-9 pump station is also being evaluated and can be the beneficiary of programs under the Army Corps of Engineers' Restudy, a reevaluation of the C&SF Flood Control Project.

9. Under the Water Resources Development Act of 1996, Congress authorized the expediting of certain projects that were identified under the Restudy that could begin implementing solutions before the Restudy was completed. These projects are commonly referred to as "Critical Projects". The S-9 pump station and the C-11 West basin are on the Army Corps of Engineers' list of Critical Projects.

10. The District has also established the Western C-11 Basin Water Quality Improvement Strategy (Exhibit 3) to provide framework to ensure that the water quality criteria for discharges from the western C-11 Basin to the Everglades Protection Area will be met as required. To date, the initial water quality monitoring program has been implemented.

* * *

**FURTHER AFFIANT SAYETH NAUGHT**

_____

Sharon M. Trost, P.G., AICP

Witness my hand and official seal in the State and County last aforesaid this 4th day of January, 1999

_____

Exhibit 2
Affidavit of Sharon Trost
January 4, 1999

Page II-1; Figures II-1, II-2, II-12 and II-13

**SECOND REVISED DRAFT PERMIT**

* * *

## II REGIONAL OVERVIEW

### A. Everglades Protection Area

The EPA is defined by the Act as: "Water Conservation Areas 1, 2A, 2B, 3A, and 3B, the Arthur R. Marshall Loxahatchee National Wildlife Refuge (the Refuge), and the Everglades National Park" (ENP).

The EPA boundaries are shown on Figure II-1. All District ECP and non-ECP structures which discharge into, within or from the EPA are shown on Figure II-2.

* * *

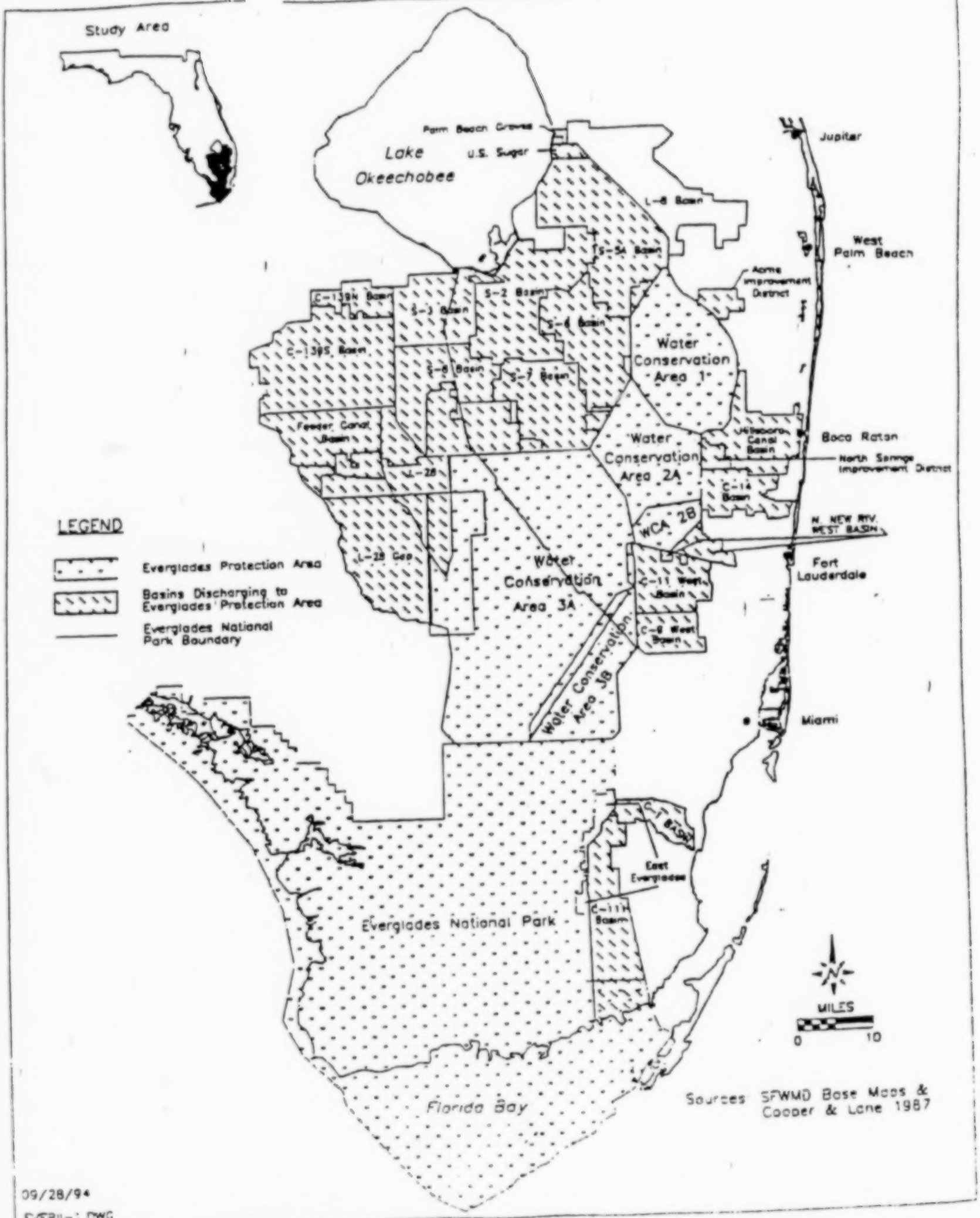


Figure II-1. Everglades Protection Area

II-2

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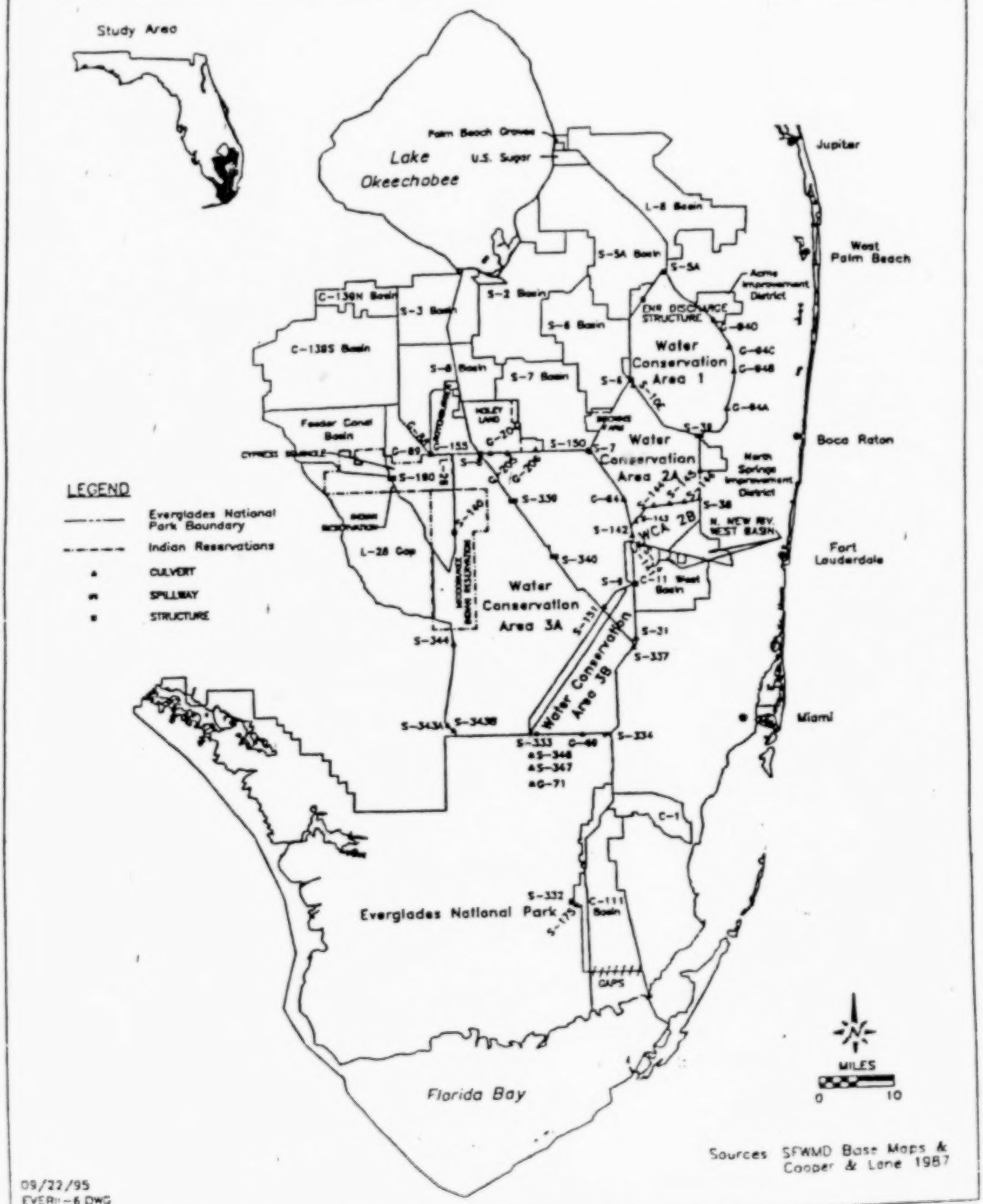
Study Area
Lake Okeechobee
Palm Beach Groves
U.S. Sugar
L-8 Basin
S-5A Basin
S-5A
S-2 Basin
S-3 Basin
C-139N Basin
C-139S Basin
S-4 Basin
S-6 Basin
S-7 Basin
Water Conservation Area 1
S-6
S-10A
S-10C
S-10E
S-10F
S-10G
S-10H
S-10I
S-10J
S-10A
S-10B
S-10C
S-10D

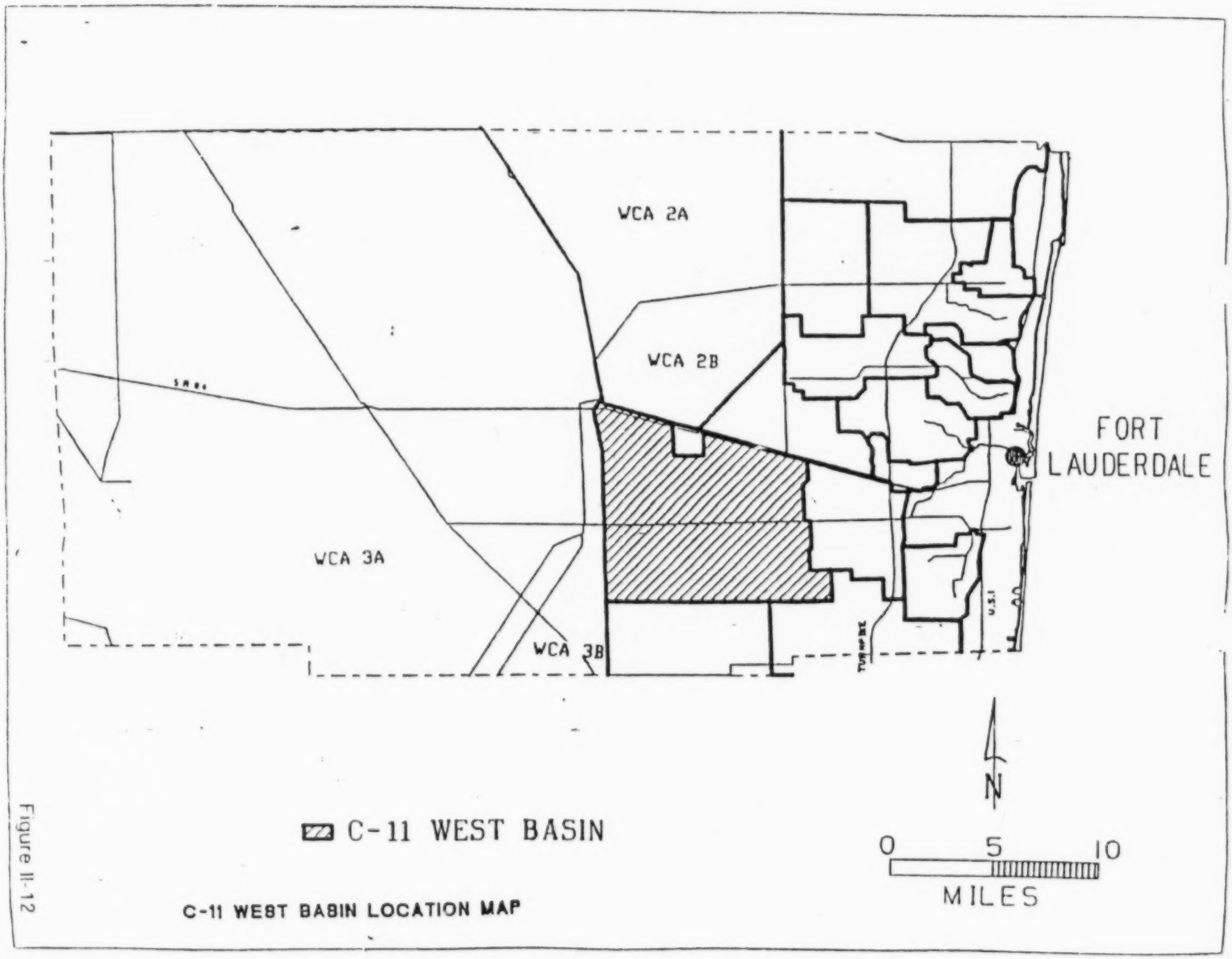


Figure II-12

C-11 WEST BASIN LOCATION MAP

# C-11 WEST BASIN

## 52.600 ACRES

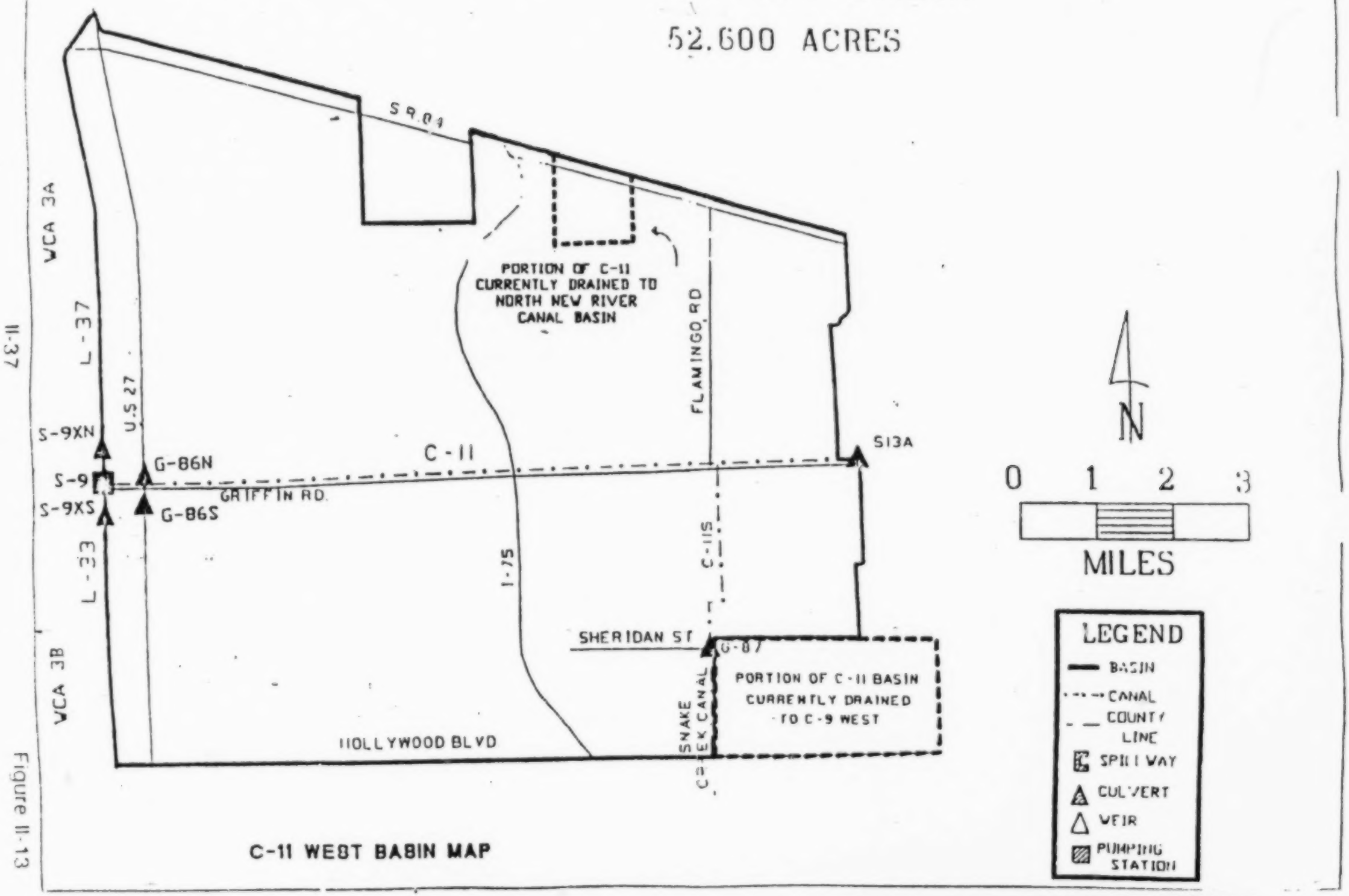


Figure II-13

C-11 WEST BABIN MAP

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**PLAINTIFF MICCOSUKEE TRIBE'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT AND RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS**

January 20, 1999

* * *

**RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS FOR CASE NOS. 98-6056 AND 98-6057.**

The following is a paragraph by paragraph discussion of the facts in Defendants' Statement of Undisputed Facts and whether or not they are disputed. Not all these facts appear to be material to the determination of whether or not the S-9 pump station is required to have an NPDES permit.

1. The Tribe does not dispute that the State of Florida Department of Environmental Protection has been authorized by EPA to issue state permits under Section 403.0885, other than NPDES stormwater permits and permits for federal facilities. However, such fact is not material to the case. It is irrelevant who issues the permits. To the extent that Defendants' wording may suggest anything else it is unanswerable or contested.

2. It is unclear what Defendants mean when they indicate "the S-9 pump facility sits directly in the C-11 canal." Defendants' Statement at 2. Thus, it is contested. However, the S-9 does connect levees 33 and 37 and forms an integral part of WCA 3A's eastern outer boundary. Waller rebuttal Affidavit at 1 (Attachment 1). The S-9

does pump water through three 960 cfs pumps from the Canal. However, the Defendants go on to say it "pumps from the canal on the east side of the structure to the canal on the west side of the structure" Defendants' Statement at 2. This is not entirely accurate. It pumps to Water Conservation Area 3A, in which there is a canal extension, which is submerged. *See* Strowd depo at 13 (SFWMD employee/witness). When water levels are above the bank of that canal, it is essentially a continuous water body, and so it is probably more accurate to say it discharges into 3A. Strowd depo at 13 (SFWMD employee/witness). Water Conservation Area 3A is on the West side of the S-9. Water is pumped from East to West. To the extent that Defendants' wording may suggest anything else it is unanswerable or contested.

3. The Tribe does not dispute that the C-11 Canal is a navigable water of the United States as that term is used in the Clean Water Act. Waller depo at 84-85. Water Conservation Area 3A is a navigable water of the United States as that term is used in the Clean Water Act. Waller depo at 84-85. To the extent that the Defendants' vague wording may suggest anything else it is unanswerable or contested.

4. Without pumping at the S-9 facility, water to the east of the structure would generally flow to the east. Affidavit of Strowd (SFWMD employee/witness); Waller depo at 75. You could have reverse flow under certain unusual very extreme hydrologic conditions. Waller depo at 75; Waller rebuttal Affidavit at 1 (Attachment 1). However, it could not naturally flow into the Water Conservation Area, to the West, without the operation of the S-9 pump station. Waller rebuttal Affidavit at 1



(Attachment 1). To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

5. The Tribe is unable at this time to confirm or deny the statements in this paragraph. It is true, however, that some of the machines used to maintain the S-9 pump station are maintained with petroleum products and make contact with the water. Affidavit of Ron Jones at 5 (Attached to Tribe's Motion for Summary Judgment as Exhibit C and hereto as part of Attachment 3); *see* Horne Affidavit at 2(SFWMD employee/witness) (Affidavit attached to Defendants' Motion for Summary Judgment as "F").[2] To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

6. The contents of paragraph 6 are not in any way material to the instant proceedings except to indicate that the discharges from the S-9 are not being required to meet State Water Quality Standards by the State of Florida. Furthermore, the paragraph contains statements of legal argument which are not factual in nature. This is highly relevant to the issues in a somewhat related case in which Judge Davis has called into question the legitimacy of the Everglades Forever Act, 373.4592, Florida Statutes. *See* Attached Opinion from Judge Davis (Attachment 2).

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[2] The Tribe is simultaneously moving to strike Horne's affidavit, filed by Defendants, as the Defendants attempted to list him as a witness in contravention of the Federal Rules of Civil procedure. To the extent it might be ruled otherwise admissible the Tribe relies on its admissions.

It is correct that the S-9 pump station has a state permit from the State of Florida Department of Environmental Protection, along with 36 other structures which discharge into within or from the Everglades Protection Area. This fact has no direct relation to the issues in this case. Defendants incorrectly cite the law under which it received its state law permit. The permit was actually issued under Section 373.4592(9)(k) and (l), Florida Statutes. The permit requires monitoring and analysis of water quality in the area of the Non-ECP structures, of which the S-9 is one. It is the Tribe's position that the permit is completely inadequate to protect the Everglades Protection Area from the impacts of pollution, fails to systematically identify sources of pollution in the C-11W Basin and that it fails to eliminated non-point sources of pollution through the District's regulatory authority as set forth in Chapter 373, Florida Statutes. *See* Jones rebuttal Affidavit at 1 (Attachment 3). It does little or nothing to actually reduce the pollution to the Everglades Protection Area and involves long delays. *See* Jones rebuttal Affidavit at 1 (Attachment 3). The permit and related statute do require that the S-9 pump station discharges meet all state water quality standards by no later than December 31, 2006, including meeting the state water quality standard for phosphorus which is supposed to be established by December 31, 2003. Affidavit of Sharon Trost (SFWMD employee/witness), January 4, 1999; *see* § 373.4592, Florida Statutes. These state law legal matters are entirely irrelevant to whether or not the S-9 must be required to have a federal permit, delegated to the state for issuance, to discharge pollutants into navigable waters of the United States. To the extent the Defendants intend to imply anything additional it is unanswerable or contested.



7. In a contemporaneous filing the Tribe is moving to strike the affidavit of Richard Drew cited in this paragraph as he has made expert opinions, which Defendants are attempting to use as evidence in this case when no expert witness summary was ever provided. Thus, no adequate opportunity for rebuttal was available to Plaintiffs. He was not presented as an expert witness but as a fact witness, and he was improperly listed even as a fact witness in the case. *See* Plaintiff Tribe's Motion to Strike testimony of Richard Drew, George Horne and Joseph M. Moore. Mr. Drew said approximately what is recorded on the pages indicated of his deposition. His opinions on the law are not facts which the Plaintiff must contest. Further, he is not a lawyer and not qualified to testify as such. To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

8. Originally, virtually all of South Florida was a part of the Everglades Basin. Waller rebuttal Affidavit at 1 (Attachment 1). Water in the Everglades historically sheet flowed throughout this area in a southerly direction. To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

9. It is correct that in early 1900's the South New River Canal (C-11 canal) was dug to drain to the east the area of Broward County located in the Everglades. Waller rebuttal Affidavit at 1 (Attachment 1); Strowd Affidavit (SFWMD witness/employee); Waller depo at 45-48. Although the flow in the canal was typically to the east, water in the C-11 canal could occasionally, under very extreme hydrologic conditions, flow from east to west. Waller rebuttal Affidavit at 1 (Attachment 3); Strowd Affidavit (SFWMD witness/employee). However, it would not naturally enter the Everglades Protection Area

without the operation of the S-9 pump station. Waller rebuttal Affidavit at 1 (Attachment 3). To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

10. During the 1950's the S-9 was placed between the levees at the eastern boundary of Water Conservation Area 3A. See Waller rebuttal Affidavit at 1 (Attachment 3). You are referred to the discussion in paragraph 2 above regarding the balance of the Defendants' statements in paragraph 10. To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

11. The statements in paragraph eleven can not, at present, all be verified by the Tribe. They do not appear to be material facts to which any dispute would be of importance to the decision about whether or not the S-9 pump station must have an NPDES permit. To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

12. Virtually every water in the Everglades Ecosystem could arguably be considered hydrologically connected. *See* Waller rebuttal Affidavit at 1 (Attachment 1); *see* Strowd depo at 41 (SFWMD employee/witness). Some seepage occurs through levees and the S-9 does pump water in the C-11 to the Water Conservation Area. Strowd Affidavit (SFWMD witness/employee); Waller depo at 114. To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

13. Paragraph 13 is not material to the issue of whether or not the S-9 should be required to have an NPDES permit. It may be factually incorrect as well. However, the statement is too vague sweeping to address.



To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

14. The District does not have a state of federal NPDES permit for the discharge from the S-9 pump station. Tribe's Complaint at ¶ 23; Friends' Complaint at ¶ 13; Drew depo at 15. To the extent the Defendants intend to imply anything additional it is unanswerable or contested.

As to the "Additional Statement of Undisputed Facts for Friends of the Everglades Case No. 98-6057," identified at pages 5 and 6 of Defendants' Statement of allegedly Undisputed Facts, it appears clear that the Defendants do not intend to indicate that they are undisputed facts as to the Plaintiff Tribe. It is therefore unnecessary for the Tribe to go into detail as to how it contests these statements. They are contested to the extent they are contrary to the Tribe's positions stated in its own motion for summary judgment and in its opposition to the Defendants' so-called undisputed facts. In fact, if not in procedure, it is apparent that they are also largely disputed by Friends of the Everglades. It is unfair and misleading to consider them in the context of the summary judgment as they are largely contested and often actually address issues of law rather than fact.

* * *

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Affidavit of Bradley G. Waller

Miccosukee Tribe of Indians v. SFWMD

1. I hereby adopt and incorporate my Affidavit, which was attached to the Miccosukee Tribe of Indians of

Florida's ("Tribe") Motion for Summary Judgment and is attached hereto and entitled Exhibit B, as it was denominated when attached to the Tribe's Motion.

2. Water in the C-11 canal could occasionally, under very extreme hydrologic conditions, flow from east to west. However, it would not naturally enter the Everglades Protection Area without the operation of the S-9 pump station.

3. Virtually all of the SFWMD and Everglades Ecosystem is hydrologically connected in some way. However, dynamic manmade features have altered and interfered with those connections, compartmentalized large areas of South Florida, and operational and structural changes have altered any semblance of natural water levels and flow patterns.

4. The S-9 connects levees 33 and 37 and forms an integral part of WCA 3A's Eastern outer boundary.

FURTHER AFFIANT SAYETH NAUGHT.

_____

Bradley G. Waller

**WITNESS** my hand and official seal in the County and State last aforesaid this 20th day of January, 1999.

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**REBUTTAL AFFIDAVIT OF DR. RONALD D. JONES**

I, Dr. Ronald D. Jones, being duly affirmed, do depose and state:

1. I hereby adopt and incorporate my Affidavit, which was attached to the Miccosukee Tribe of Indians of



Florida's ("Tribe") Motion for Summary Judgment and is attached hereto and entitled Exhibit C, as it was denominated when attached to the Tribe's Motion.

2. I am intimately familiar with the Non-Everglades Construction Project Permit. The S-9 pump station is one of the structures permitted by that state of Florida permit. I have thoroughly reviewed the permit and permit application. I was a witness in the case challenging that permit, and I was present for much of the hearing.

3. The Non-ECP permit is completely inadequate to protect the Everglades Protection Area from the impacts of pollution. Contrary to assertions of the SFWMD, it fails to systematically identify sources of pollution in the C-11W Basin and it fails to eliminated non-point sources of pollution through the District's regulatory authority.

4. The actions required by the permit do very little or nothing, that actually reduce the pollution to the Everglades Protection Area and involve long delays.

5. The S-9 pump station pumps water of very low quality (polluted) water from the C-11 canal into a higher quality body of water (Water Conservation Area 3A which is connected to other Everglades Areas) into which it would not flow absent the pumping.

6. The C-11 canal and the Everglades have very different characteristics. The Everglades, which includes Water Conservation Area 3A, is a Class III water body having high water quality and a diverse and vibrant biological community that depends upon the oligotrophic (low nutrient) water it receives from rainfall and overland flow. The C-11 canal is a drainage and water collection system that serves the C-11 Basin in western Broward County. As

such the waters it contains are not ologotrophic and are dramatically different from the waters in the Everglades. The water in the C-11 is incapable of supporting a natural Everglades community and in fact the pumping of this water into the Everglades through the S-9 pump leads to destruction of the biological communities found in WCA 3A. The water in the C-11 canal is neither compatible with the water in the Everglades nor is it in any way comparable to it.

7. I am very familiar with the activities of the regulators of the Everglades Protection Area. None of the current activities are designed to address the water quality problems being caused by the water the S-9 discharges into the Everglades Protection Area.

8. The polluted water being discharged by the S-9 is causing or contributing to the water quality problems in Water Conservation Area and Everglades National Park.

WHEREFORE, the S-9 should be required to have an NPDES permit.

FURTHER AFFIANT SAYETH NAUGHT.

_____

Dr. Ronald D. Jones

**WITNESS** my hand and official seal in the County and State last aforesaid this 20th day of January, 1999.

_____



**SOUTH FLORIDA WATER MANAGEMENT'S RESPONSE TO MICCOSUKEE TRIBE'S MOTION FOR SUMMARY JUDGMENT (MEMORANDUM OF LAW INCLUDED)**

January 22, 1999

* * *

## I. Concise Statement of The Material Facts As to Which There Are Genuine Issues To Be Tried

The District contends there are *no material facts as to which there exist genuine issues to be tried* in this case.

The District wishes to clarify some of the Plaintiff's proposed facts. None of these qualifications result in material disputed facts for the purposes of this motion.

* * *

. . . [T]he use of the term "Everglades" must be defined as used in the assertions. "Everglades" could mean the Everglades National Park, the Everglades Protection Area, as defined in Section 373.4592(2)(h), Fla. Stat., or the historical "Everglades" as they existed prior to man's alteration of the hydrologic system. The Everglades National Park is 20-40 miles away from the S-9 pump station. (Jones deposition, filed by SFWMD under Certificate of Service dated 1/22/99; Waller deposition, SFWMD's Exhibit "G" to support its Motion for Summary Judgment dated 1/4/99). Water Conservation Area 3A, while created before the Everglades Forever Act as a water impoundment area (Strowd Affidavit; SFWMD's Exhibit "E" to support its Motion for Summary Judgment dated 1/4/99) is designated part of the Everglades Protection Area as

defined in Section 373.4592(2)(h), Fla. Stat. The historical Everglades began in the area of the Butler Chain of Lakes, and flowed south through the Kissimmee River Area, to Lake Okeechobee and south southwesterly to Florida Bay. (Strowd Affidavit; SFWMD's Exhibit "E" to support its Motion for Summary Judgment dated 1/4/99)

The District has attempted in good faith to respond to the assertions with as much specificity as possible. Nevertheless, resolution of these issues is not necessary for the adjudication on the Motion for Summary Judgment at bar. Essentially, the issues in the Motion for Summary Judgment are whether the operation of the S-9 pump station requires an NPDES permit according to the criteria for those permits set out in the Clean Water Act and corresponding case law. The factual clarifications below are not material to this resolution.

Specific Clarifications

The Defendants respond to the Tribe's Statement of Undisputed Facts as follows:

* * *

2. The District does not dispute nor require clarification for factual assertions 9-12, 14, 15, 17-21, 24, 25, 27, 29-32, 37-41, 46, 48-51, 56-59, 62-71, 73-79, 81, 82.

3. Factual assertions 13 and 16 – The District agrees that water from the C-11 basin could travel down the L67A canal and miles later could enter Everglades National Park after passing through other structures. The possible creation of gaps in the L67 by the Army Corps of Engineers several miles down from the S-9 discharge could release some water from the S-9 discharge into Water



Conservation Area 3B. However, the District contends that factual assertions 13 and 16 are incomplete. Only approximately one half of the discharge from S-9 pumps will flow down the L67A canal, with the remaining water from the S-9 discharge going into other canals in WCA-3A. (Waller deposition, SFWMD;s Exhibit "G" to support its Motion for Summary Judgment dated 1/4/99). The water must travel over 20 miles to reach the Everglades National Park. Dilution with water from the marsh can occur along the way. (Waller deposition, p. 102-107, SFWMD's Exhibit "G" to support its Motion for Summary Judgment dated 1/4/99). However, these clarifications are not material to the resolution of this motion.

4. Factual assertions 22, 23, 36, 49, 65, 72 – The District clarifies the use of the terms "discharge". The term was not defined during the depositions cited. The deponents cited by the Tribe used the term "discharge" as a lay term, without reference to the CWA definition that includes the "addition of a pollutant" (see above). The District contends, and it is supported by the affidavits, that the operation of the S-9 pump station does not add pollutants to the water it conveys. (Horne Affidavit, SFWMD's Exhibit "F" to its Motion for Final Judgment; Jones deposition, p. 30, 90, 91, 108, 109, filed by SFWMD under Certificate of Service dated 1/22/98; Waller deposition, p. 93-95 SFWMD;s Exhibit "G" to support its Motion for Summary Judgment dated 1/4/99). The District denies the assertion under the definitions of the Clean Water Act.

* * *

8. Factual Assertion 35 – S-9 delivers water to within Water Conservation Area 3A (WCA 3A), not the other

water conservation areas. This is not a material disputed fact that would prevent resolution of this motion.

9. Factual assertion 42 – While the District does not dispute that the Everglades are generally a marsh and the C-11 is a canal, neither side disputes that the C-11 canal continues from WCA 3A, part of the Everglades Protection Area, to the C-11 West Basin. It is present on both sides of the artificial levee which now separates what was once one natural body of water. (Jones deposition, p. 110, 111, filed by SFWMD under Certificate of Service dated 1/22/99; Strowd Affidavit, SFWMD's Exhibit "E" to support its Motion for Summary Judgment dated 1/4/99). Ground water flows and historical surface water flows indicate that these areas are still hydrologically connected. (Strowd Affidavit, SFWMD's Exhibit "E" to support its Motion for Summary Judgment dated 1/4/99).

* * *

17. Factual assertion 72 – The District does not dispute the assertion with the following clarifications:

> Sentence One: The land that is leased to the Miccosukee Tribe does not include the areas of WCA 3A adjacent to the S-9 structure and only includes portions of the western areas of the WCA. (See Exhibit "A"). As the District does not contest the Tribe's standing in this case this is not a dispute over a material fact and does not affect the court's ability to decide this motion.
>
> Sentence five: The District agrees that the S-9 pump station is a critical project, however it is unclear what Dr. Jones means by "immediate clean up options." Given the constraints of funding, resources and technology it is impossible to guess what "immediate" could mean and thus the



> District disputes this portion of the assertion. This issue is not a material fact that would prevent the adjudication of the motion for summary judgment.

* * *

19. Factual assertions 84 and 85 – See the District's response to factual assertion 42.

---

**TRANSCRIPT OF HEARING**
**BEFORE THE HONORABLE**
**WILKIE D. FERGUSON, JR.**
**February 4, 1999**

* * *

[66] MS. SOLE-CALAS: Your Honor, very briefly. I do not want to reiterate all the points I made in my previous discussions. I do agree with counsel, there are no material disputed facts that relate to the five factors for an NPDES permit.

Both sides agree and again I agree that our differences lie in the application of the law for these factors.

* * *

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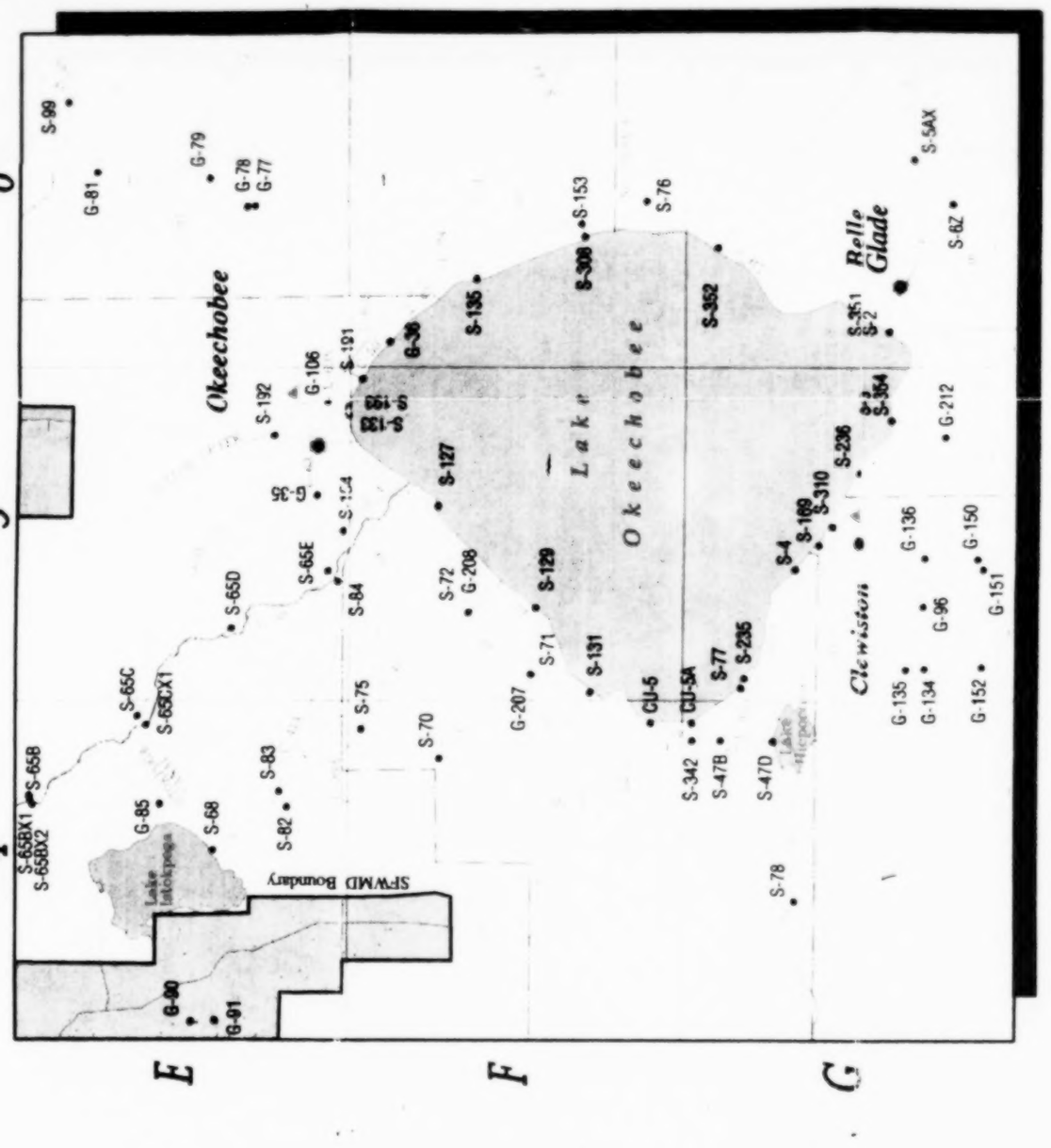
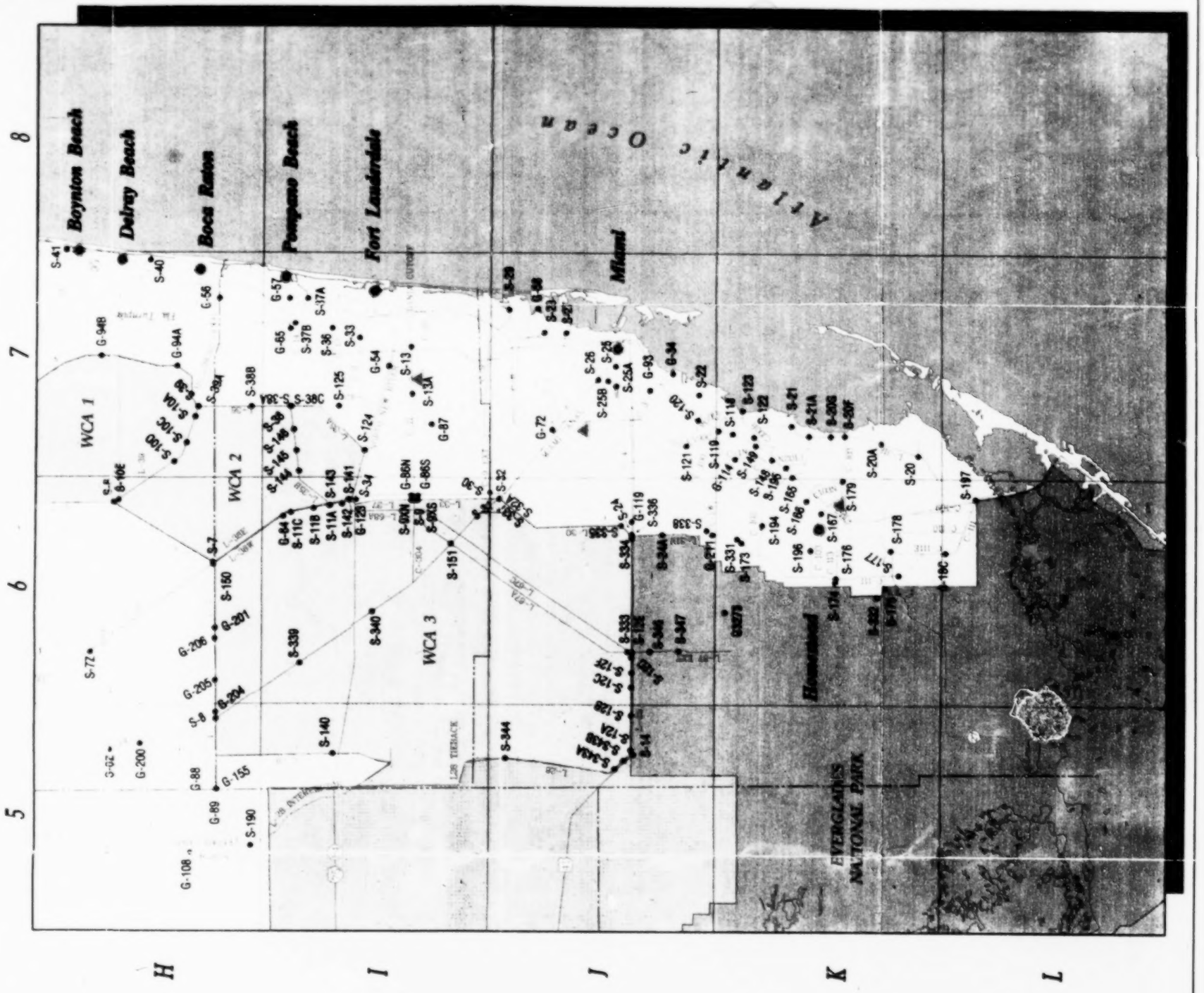
# STRUCTURE AND CANAL LOCATIONS

Revised 09/29/93

PLAINTIFF'S EXHIBIT
#9 TEW
12-14-98

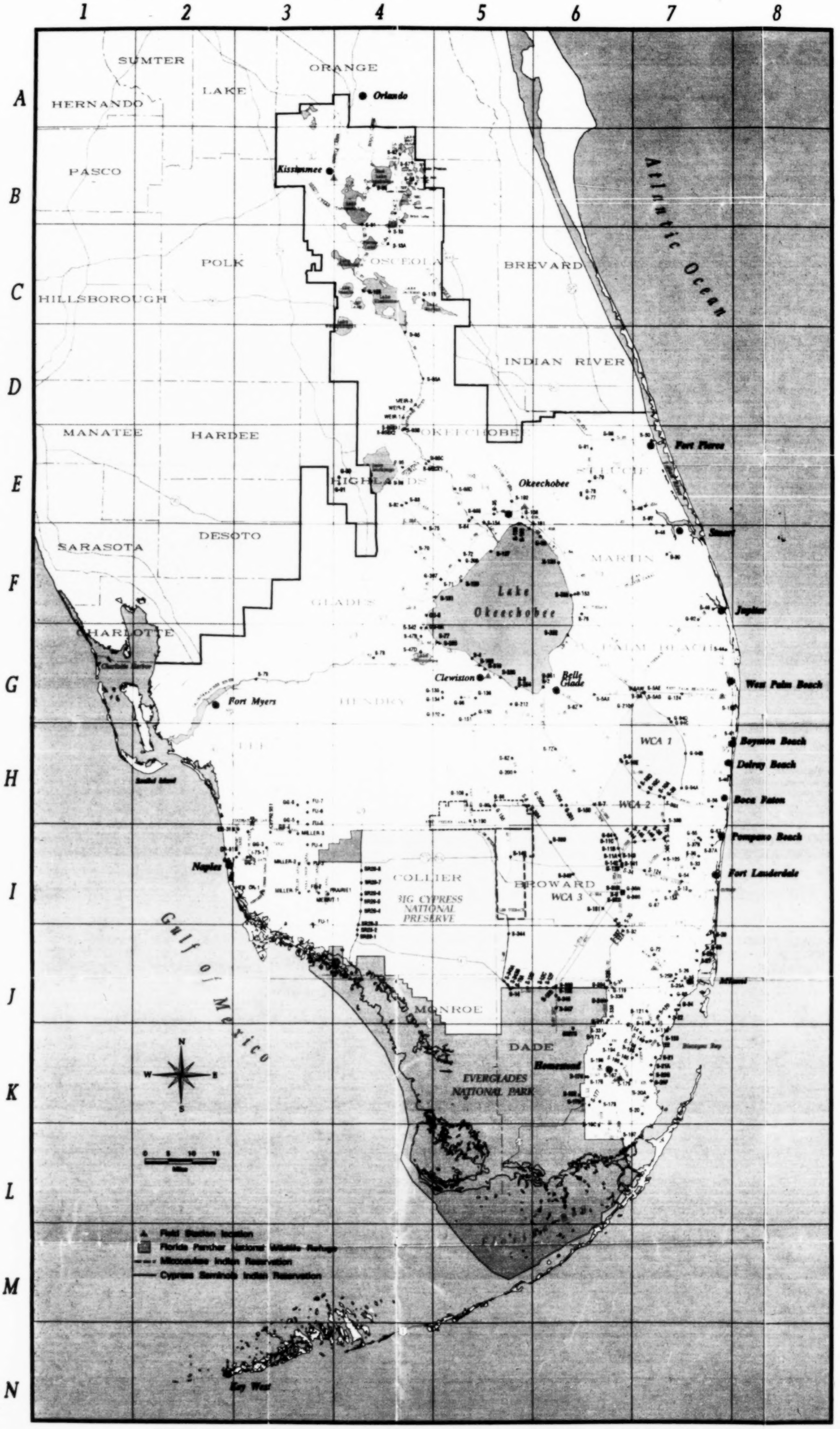
EXHIBIT NO. 9
U.S. District Court, So. Dist. of FL
No. 02-626
So. FL Water Mgt. v. Miccosukee Tribe





Boynton Beach
Delray Beach
Boca Raton
Pompano Beach
Fort Lauderdale
Miami
Atlantic Ocean
WCA 1
WCA 2
WCA 3
Homestead
EVERGLADES NATIONAL PARK
L-28 INTERCEPT
L-28 TERRACE
L-67A
L-67C
L-67 EXT
L-67 EXT
L-67 EXT

## STRUCTURE LOCATIONS

| | | | |
|---|---|---|---|
| CR-31N | I 3 | S-166 | K 6 |
| CR-31S | I 3 | S-167 | K 6 |
| CU-5 | F 4 | S-169 | G 5 |
| CU-5A | G 4 | S-173 | K 6 |
| CYPRESS1 | J 3 | S-174 | K 6 |
| FU-1 | I 3 | S-175 | K 6 |
| FU-2 | I 3 | S-176 | K 6 |
| FU-3 | I 3 | S-177 | K 6 |
| FU-4 | I 3 | S-178 | K 6 |
| FU-5 | H 3 | S-179 | K 6 |
| FU-6 | H 3 | S-18C | L 6 |
| FU-7 | H 3 | S-190 | H 5 |
| G-34 | J 7 | S-191 | F 5 |
| G-35 | E 5 | S-192 | E 5 |
| G-36 | F 6 | S-193 | E 5 |
| G-54 | J 7 | S-194 | K 6 |
| G-56 | H 7 | S-195 | K 7 |
| G-57 | I 7 | S-196 | K 6 |
| G-58 | J 7 | S-197 | L 6 |
| G-64 | I 6 | S-2 | G 6 |
| G-65 | I 7 | S-20 | K 7 |
| G-72 | J 7 | S-20A | K 7 |
| G-77 | E 6 | S-20F | K 7 |
| G-78 | E 6 | S-20G | K 7 |
| G-79 | E 6 | S-21 | K 7 |
| G-81 | E 6 | S-21A | K 7 |
| G-85 | E 4 | S-22 | J 7 |
| G-86N | I 6 | S-235 | G 5 |
| G-86S | I 6 | S-236 | G 5 |
| G-87 | I 7 | S-24 | J 6 |
| G-88 | H 5 | S-24A | J 6 |
| G-89 | H 5 | S-25 | J 7 |
| G-90 | E 4 | S-25A | J 7 |
| G-91 | E 4 | S-25B | J 7 |
| G-92 | F 7 | S-26 | J 7 |
| G-93 | J 7 | S-27 | J 7 |
| G-94A | H 7 | S-28 | J 7 |
| G-94B | H 7 | S-29 | J 7 |
| G-94C | G 7 | S-3 | G 5 |
| G-94D | G 7 | S-30 | I 6 |
| G-95 | G 5 | S-308 | F 6 |
| G-103 | C 4 | S-31 | I 6 |
| G-106 | E 5 | S-310 | G 5 |
| G-108 | H 5 | S-32 | J 6 |
| G-113 | C 4 | S-32A | J 6 |
| G-114 | K 7 | S-33 | I 7 |
| G-119 | J 6 | S-331 | K 6 |
| G-123 | J 6 | S-332 | K 6 |
| G-124 | G 7 | S-333 | J 6 |
| G-134 | G 5 | S-334 | J 6 |
| G-135 | G 5 | S-335 | J 6 |
| G-136 | G 5 | S-336 | J 6 |
| G-150 | G 5 | S-337 | J 6 |
| G-151 | G 5 | S-338 | J 6 |
| G-152 | G 5 | S-339 | I 6 |
| G-155 | H 5 | S-34 | I 6 |
| G-200 | H 5 | S-340 | I 6 |
| G-201 | H 6 | S-342 | G 4 |
| G-204 | H 6 | S-343A | J 5 |
| G-205 | H 6 | S-343B | J 5 |
| G-206 | H 6 | S-344 | J 5 |
| G-207 | F 5 | S-346 | J 6 |
| G-208 | F 5 | S-347 | J 6 |
| G-210 | G 7 | S-351 | G 6 |
| G-211 | J 6 | S-352 | G 6 |
| G-212 | G 5 | S-354 | G 5 |
| G-3273 | K 6 | S-36 | I 7 |
| GG-1 | I 3 | S-37A | I 7 |
| GG-2 | I 3 | S-37B | I 7 |
| GG-3 | I 3 | S-38 | I 7 |
| GG-4 | I 3 | S-38A | I 7 |
| GG-5 | H 3 | S-38B | H 7 |
| GG-6 | H 3 | S-38C | I 7 |
| HEN CR-1 | I 3 | S-39 | H 7 |
| I-75-1 | I 3 | S-39A | H 7 |
| I-75-3 | I 3 | S-4 | G 5 |
| MERRIT-1 | I 3 | S-40 | H 7 |
| MILLER-1 | I 3 | S-41 | H 8 |
| MILLER-2 | I 3 | S-44 | G 7 |
| MILLER-3 | I 3 | S-46 | F 7 |
| PRAIRIE1 | J 3 | S-47B | G 4 |
| SR29-1 | J 4 | S-47D | G 4 |
| SR29-2 | J 4 | S-48 | E 7 |
| SR29-3 | I 4 | S-49 | E 7 |
| SR29-4 | I 4 | S-50 | E 7 |
| SR29-5 | I 4 | S-57 | B 4 |
| SR29-6 | I 4 | S-58 | B 4 |
| SR29-7 | I 4 | S-59 | B 4 |
| SR29-8 | I 4 | S-5A | G 7 |
| S-10A | H 7 | S-5AE | G 7 |
| S-10C | H 7 | S-5AS | G 7 |
| S-10D | H 7 | S-5AW | G 7 |
| S-10E | H 6 | S-5AX | G 6 |
| S-118 | K 7 | S-6 | H 6 |
| S-119 | K 7 | S-6Z | G 6 |
| S-11A | I 6 | S-60 | B 4 |
| S-11B | I 6 | S-61 | B 4 |
| S-11C | I 6 | S-62 | B 4 |
| S-120 | J 7 | S-63 | C 4 |
| S-121 | J 7 | S-63A | C 4 |
| S-122 | K 7 | S-65 | D 4 |
| S-123 | K 7 | S-65A | D 4 |
| S-124 | I 7 | S-65B | E 4 |
| S-125 | I 7 | S-65BX1 | E 4 |
| S-127 | F 5 | S-65BX2 | E 4 |
| S-129 | F 5 | S-65C | E 4 |
| S-12A | I 5 | S-65CX1 | E 4 |
| S-12B | J 5 | S-65D | E 5 |
| S-12C | I 6 | S-65E | E 5 |
| S-12D | I 6 | S-68 | E 4 |
| S-12E | I 6 | S-7 | H 6 |
| S-12F | I 6 | S-7Z | H 6 |
| S-13 | I 7 | S-70 | F 4 |
| S-131 | F 5 | S-71 | F 5 |
| S-133 | E 5 | S-72 | F 5 |
| S-135 | F 6 | S-75 | F 4 |
| S-13A | I 7 | S-76 | F 6 |
| S-14 | I 5 | S-77 | G 5 |
| S-140 | I 5 | S-78 | G 4 |
| S-141 | I 6 | S-79 | G 3 |
| S-142 | I 6 | S-8 | H 5 |
| S-143 | I 6 | S-8Z | H 5 |
| S-144 | I 7 | S-80 | F 7 |
| S-145 | I 7 | S-82 | E 4 |
| S-146 | I 7 | S-83 | E 4 |
| S-148 | K 7 | S-84 | E 5 |
| S-149 | K 7 | S-9 | I 6 |
| S-150 | H 6 | S-97 | E 7 |
| S-151 | I 6 | S-99 | E 6 |
| S-153 | F 6 | WEIR-1 | D 4 |
| S-154 | E 5 | WEIR-2 | D 4 |
| S-155 | G 8 | WEIR-3 | D 4 |
| S-165 | K 7 | | |




## CANAL/LEVEE LOCATIONS

| | | |
|---|---|---|
| AIRPORT ROAD CANAL | I | 3 |
| BOGGY CREEK | B | 4 |
| C-1 | K | 7 |
| C-10 | I | 7 |
| C-100 | I | 7 |
| C-100A | I | 7 |
| C-100B | I | 7 |
| C-100C | I | 7 |
| C-102 | K | 7 |
| C-102N | K | 7 |
| C-103 | K | 7 |
| C-103N | K | 6 |
| C-103S | K | 6 |
| C-109 | L | 7 |
| C-11 | I | 7 |
| C-110 | L | 6 |
| C-111 | K | 6 |
| C-111 | L | 6 |
| C-111E | K | 6 |
| C-113 | K | 7 |
| C-12 | I | 7 |
| C-13 | I | 7 |
| C-14 | I | 7 |
| C-15 | H | 7 |
| C-16 | H | 7 |
| C-17 | G | 7 |
| C-18 | G | 7 |
| C-19 | G | 7 |
| C-1N | K | 7 |
| C-1W | I | 7 |
| C-2 | I | 7 |
| C-23 | E | 7 |
| C-23A | E | 7 |
| C-24 | E | 6 |
| C-25 | E | 6 |
| C-25 EXT | D | 6 |
| C-29A | B | 4 |
| C-29B | B | 4 |
| C-3 | I | 7 |
| C-30 | B | 4 |
| C-304 | B | 4 |
| C-31 | B | 4 |
| C-32B | B | 4 |
| C-32C | B | 4 |
| C-32D | B | 4 |
| C-32F | B | 4 |
| C-32G | B | 4 |
| C-33 | C | 4 |
| C-34 | C | 4 |
| C-35 | C | 4 |
| C-36 | C | 4 |
| C-37 | C | 4 |
| C-38 | D | 4 |
| C-39A | E | 4 |
| C-4 | I | 7 |
| C-40 | F | 5 |
| C-41 | F | 4 |
| C-41A | E | 4 |
| C-42 | I | 4 |
| C-43 | G | 4 |
| C-44 | F | 4 |
| C-51 | G | 6 |
| C-59 | F | 6 |
| C-6 | J | 7 |
| C-7 | I | 7 |
| C-8 | I | 7 |
| C-9 | I | 7 |
| C-9 EXT | I | 7 |
| CALOOSAHATCHEE RIVER | G | 2 |
| COCOHATCHEE CANAL | H | 3 |
| CYPRESS CANAL | I | 3 |
| DANIA CUTOFF | I | 7 |
| FAKA UNION CANAL | I | 3 |
| GOLDEN GATE MAIN | I | 3 |
| HENDERSON CREEK | I | 3 |
| HILLSBORO CANAL | I | 3 |
| I-75 CANAL | I | 3 |
| ISTOKPOGA CANAL | E | 4 |
| KISSIMMEE RIVER | D | 4 |
| L-1 | G | 5 |
| L-10 | G | 6 |
| L-12 | G | 6 |
| L-13 | G | 6 |
| L-14 | G | 6 |
| L-15 | H | 6 |
| L-16 | H | 6 |
| L-18 | H | 6 |
| L-19 | H | 6 |
| L-2 | H | 5 |
| L-20 | G | 6 |
| L-21 | G | 5 |
| L-24 | G | 5 |
| L-25 | G | 5 |
| L-28 | G | 5 |
| L-28 INTERCEPTOR | I | 5 |
| L-29 | I | 5 |
| L-3 | H | 5 |
| L-30 | K | 6 |
| L-31E | K | 6 |
| L-31N | K | 6 |
| L-31W | K | 6 |
| L-33 | I | 6 |
| L-35A | I | 6 |
| L-35B | I | 6 |
| L-36 | I | 6 |
| L-37 | I | 6 |
| L-38E | H | 6 |
| L-38W | H | 6 |
| L-39 | H | 7 |
| L-4 | H | 5 |
| L-40 | H | 7 |
| L-41 | G | 4 |
| L-42 | G | 4 |
| L-47 | F | 6 |
| L-49 | F | 5 |
| L-5 | H | 6 |
| L-50 | F | 4 |
| L-59 | F | 5 |
| L-6 | H | 6 |
| L-60 | F | 5 |
| L-61 | F | 4 |
| L-62 | E | 5 |
| L-63N | E | 5 |
| L-63S | F | 6 |
| L-64 | F | 6 |
| L-65 | F | 6 |
| L-67 EXT | I | 6 |
| L-67A | I | 6 |
| L-67C | I | 6 |
| L-68A | I | 6 |
| L-7 | H | 6 |
| L-8 | G | 6 |
| L-8 TIEBACK | G | 7 |
| L28 TIEBACK | G | 5 |
| LD-1 | G | 5 |
| LD-3 | F | 6 |
| LD-4 | F | 5 |
| LD-9 | G | 6 |
| MIAMI CANAL | I | 7 |
| MERRITT CANAL | I | 3 |
| MILLER CANAL | I | 3 |
| NO. TIEBACK | F | 6 |
| NORTH FEEDER CANAL | H | 5 |
| NORTH NEW RIVER | I | 7 |
| PRAIRIE CANAL | I | 3 |
| REEDY CREEK | B | 3 |
| SHINGLE CREEK | B | 4 |
| ST. LUCIE CANAL | F | 6 |
| TAYLOR CREEK | E | 5 |
| WEST FEEDER CANAL | H | 5 |
| WEST PALM BEACH CANAL | G | 7 |

SFWMD

# SFWMD STRUCTURE AND CANAL LOCATIONS

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# In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

## RULES 29.6 AND 14.1 STATEMENT

Petitioner is the South Florida Water Management District, a governmental entity of the State of Florida created by Florida Statutes § 373.069(e).

Respondents are the Miccosukee Tribe of Indians of Florida, a federally recognized Indian tribe, and the Friends of the Everglades, Inc., a non-profit Florida corporation.



## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| RULES 29.6 AND 14.1 STATEMENT | ii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES AND REGULATIONS INVOLVED | 1 |
| STATEMENT | 1 |
| A. The South Florida Water Management District And Its Ecosystem | 5 |
| B. Early Efforts At Everglades Reclamation | 6 |
| C. The U.S. Army Corps Of Engineers' Central & South Florida Project | 7 |
| 1. Water Conservation Area 3 | 8 |
| 2. Levees L-33 and L-37 | 9 |
| 3. The C-11 Basin | 10 |
| 4. The C-11 Canal | 10 |
| 5. The S-9 Pumping Station | 11 |
| D. Degradation Of The Natural System | 12 |
| E. Comprehensive Everglades Restoration | 13 |
| 1. The Settlement Agreement | 14 |
| 2. The Statement of Principles and Florida's Everglades Forever Act | 15 |
| 3. The Comprehensive Everglades Restoration Plan | 16 |

TABLE OF CONTENTS – Continued

Page

F. Restoration Projects Specific To Waters Managed By The S-9 Pump Station ..... 17

G. Respondents' Suits And The District Court's Decision ..... 18

H. The Eleventh Circuit's Decision ..... 19

SUMMARY OF ARGUMENT ..... 20

ARGUMENT ..... 23

I. THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM DOES NOT EXTEND TO STATE FLOW DIVERSION FACILITIES THAT DO NOT CONTRIBUTE POLLUTANTS TO THE NATION'S WATERS ..... 23

A. The Plain Language, Structure, And Purposes Of The Clean Water Act Show That NPDES Permits Are Not Required For The Mere Diversion Of Water Through The S-9 Pump Facility ..... 24

B. Legislative History Confirms That The NPDES Program Is Limited To Sources Of Pollutants And Does Not Address Pollution Caused By Water Diversions ..... 32

C. Ordinary Principles Of Statutory Interpretation Establish That The NPDES Program Does Not Apply To Water Diversion Facilities ..... 34

1. A Plain Statement From Congress Is Required To Displace Traditional State Jurisdiction Over State Water Management And Is Lacking Here ..... 34



TABLE OF CONTENTS – Continued

Page

2. The Application Of NPDES To Water Diversion Facilities Would Lead To Absurd And Disastrous Results That Would Thwart Congress's Purposes ..... 37

3. The CWA's Severe Criminal Penalties Require That It Be Narrowly Construed ..... 45

II. A STATE'S DIVERSION OF WATER FROM ONE TO ANOTHER PART OF A SINGLE NAVIGABLE WATER LIKE THE EVERGLADES ECOSYSTEM INVOLVES NO "ADDITION" AND THUS FALLS OUTSIDE THE NPDES SCHEME ..... 46

CONCLUSION ..... 49

TABLE OF AUTHORITIES

Page

CASES

*Admiral Ins. Co.* v. *Feit Mgmt. Co.*, 321 F.3d 1326 (11th Cir. 2003) ..... 27

*Appalachian Power Co.* v. *Train*, 545 F.2d 1351 (4th Cir. 1976) ..... 27, 42

*Arkansas* v. *Oklahoma*, 503 U.S. 91 (1992) ..... 25

*Association to Protect Hammersley, Eld, & Totten Inlets* v. *Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002) ..... 28

*BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) ..... 34

*Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983) ..... 32

*Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003) ..... 30

*Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... 23, 43

*Colautti* v. *Franklin*, 439 U.S. 379 (1979) ..... 28

*Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) ..... 26

*Crandon* v. *United States Boeing Co.*, 494 U.S. 152 (1990) ..... 22, 45

*Dubois* v. *United States Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 2001) ..... 30

*E.I. Du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ..... 31



TABLE OF AUTHORITIES – Continued

Page

*EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976) ..... 25, 26

*Fishermen* v. *Closter Farms*, 300 F.3d 1294 (11th Cir. 2002) ..... 43

*Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) ..... 21

*Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) ..... 21

*Jones* v. *United States*, 529 U.S. 848 (2000) ..... 26

*King* v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) ..... 24

*Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ..... 2

*National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) ..... 25, 27, 31, 32

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*PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994) ..... 25, 30, 35

*Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002) ..... 3, 36

*Rewis* v. *United States*, 401 U.S. 808 (1971) ..... 44

*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) ..... 34

*Russell* v. *Law Enforcement Assistance Admin.*, 637 F.2d 354 (5th Cir. 1981) ..... 28

*Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ..... 2, 4, 21, 34, 35

*United States* v. *American Trucking Ass'ns*, 310 U.S. 534 (1940) ..... 38

TABLE OF AUTHORITIES – Continued

Page

*United States* v. *Bass*, 404 U.S. 336 (1971) .....34

*United States* v. *Granderson*, 511 U.S. 39 (1994).....45

*United States* v. *Lopez*, 514 U.S. 549 (1995).....35

*United States* v. *M.C.C. of Fla.*, 772 F.2d 1501 (11th Cir. 1985), vacated, 481 U.S. 1034 (1987) .....30

*United States* v. *Nordic Village*, 503 U.S. 30 (1992) .....26

*United States* v. *Plaza Health Labs.*, 3 F.3d 643 (2d Cir. 1993).....29

*United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).....27

*United States* v. *Rutherford*, 442 U.S. 544 (1979).....32

*United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992).....45

*Williams* v. *Taylor*, 529 U.S. 420 (2000).....26

STATUTES

33 U.S.C. § 407.....32

33 U.S.C. § 1251.....*passim*

33 U.S.C. § 1288.....3, 36

33 U.S.C. § 1311.....*passim*

33 U.S.C. § 1312..... 2

33 U.S.C. § 1313.....*passim*

33 U.S.C. § 1314.....*passim*

33 U.S.C. § 1316.....31

33 U.S.C. § 1319.....43, 45

33 U.S.C. § 1329.....3, 25, 36



TABLE OF AUTHORITIES – Continued

Page

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33 U.S.C. § 1344..... 2

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43 U.S.C. § 982..... 6

Fla. Admin. Code ch. 62-302.....41

Fla. Admin. Code § 62-302.400.....10

Fla. Laws ch. 91-80 .....14

Fla. Laws ch. 6456 (1913)..... 6

Fla. Laws ch. 25270 (1949)..... 8

Fla. Stat. § 11.80.....16

Fla Stat. ch. 373.....36, 41

Fla. Stat. § 373.016.....5, 13

Fla. Stat. § 373.042..... 5

Fla. Stat. § 373.069..... 5

Fla. Stat. § 373.073..... 5

Fla. Stat. § 373.0831..... 5

Fla. Stat. § 373.403.....9, 10

Fla. Stat. § 373.1501.....8, 13

Fla. Stat. § 373.4592..... 14, 15, 17, 36, 48

Fla. Stat. § 373.4593.....36

Fla. Stat. ch. 403.....41

Fla. Stat. § 403.067(1).....42

Water Resource Development Act of 1996, P.L. 104-303 .....5, 48

TABLE OF AUTHORITIES – Continued

Page

Water Resource Development Act of 2000, P.L. 106-541 ..... 48

REGULATIONS

40 C.F.R. Part 30 (2001) ..... 42

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40 C.F.R. Parts 400-471 ..... 31

OTHER AUTHORITIES

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TABLE OF AUTHORITIES – Continued

Page

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Florida Executive Order No. 99-144 ..... 16

H.R. Rep. No. 92-911 (1971) ..... 21, 33, 34

S. Rep. No. 92-414 (1971), reprinted in 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT OF 1972, Ser. No. 93-1 ..... 32, 33, 34

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SFWMD Resolution No. 01-22 (2001) ..... 16

SFWMD & DEP, 2003 EVERGLADES CONSOLIDATED REPORT ..... *passim*

Brian J. Skinner & Stephen C. Porter, PHYSICAL GEOLOGY (1987) ..... 38

UNITED STATES CENSUS (2002) ..... 12

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4 U.S. Army Corps of Engineers, C&SF PROJECT MASTER WATER CONTROL MANUAL (1996) ..... 9, 11, 12

U.S. Department of Interior, et al., Statement of Principles (July 1993) ..... 15

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971) ..... 26, 46

## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 280 F.3d 1364. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 33a-34a) is unreported. The opinion of the district court (Pet. App. 15a-30a) is unofficially reported at 1999 WL 3349862.

### JURISDICTION

The opinion of the court of appeals was entered on February 1, 2002. Pet. App. 1a-14a. The Eleventh Circuit denied petitioner's motion for rehearing and rehearing en banc on June 21, 2002. Pet. App. 33a-34a. On August 29, 2002, Justice Kennedy extended the time for filing the petition for certiorari to and including October 21, 2002. Pet. App. 35a-36a. The petition was filed on that date and was granted on June 27, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

### STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Federal Water Pollution Control Act of 1972 ("Clean Water Act" or "CWA") and the Water Resource Development Acts of 1996 and 2000 are reproduced in an addendum to this brief.

### STATEMENT

Petitioner South Florida Water Management District ("SFWMD" or "District") operates a comprehensive water management system of levees, canals and flow diversion facilities designed to control and allocate the waters in the Everglades ecosystem for flood control, water supply, and environmental purposes. At issue here is whether the District's pumping of water across a levee requires a National Pollutant Discharge Elimination System ("NPDES") permit under Section 402 of the Clean Water Act (33 U.S.C. § 1342(a)) when the pump diverts water

containing pollutants that do not originate from the District's pumps. The Eleventh Circuit erroneously held that the District requires an NPDES permit for this activity. The Clean Water Act in fact assigns the regulation of such water movements to state non-NPDES programs.

In furtherance of Congress's goal to eliminate "the discharge of pollutants into the navigable waters" (CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1)), the Clean Water Act makes it unlawful to "discharge" "any pollutant" unless [the Environmental Protection Agency ("EPA")], "after opportunity for public hearing," issues an NPDES permit establishing "effluent limitations" for the point source of the pollutant. *Id.* §§ 301(a), 301(b)(1)(A), 302, 402(a), 33 U.S.C. §§ 1311(a), 1311(b)(1)(A), 1312, 1342(a); see *Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981). The Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). A "point source," in turn, is "any discernible, confined and discrete conveyance," such as a "pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure." *Id.* § 502(14), 33 U.S.C. § 1362(14). "Navigable waters" are "the waters of the United States, including the territorial seas." *Id.* §§ 502(7), 33 U.S.C. § 1362(7); see *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*"SWANCC"*).

The NPDES permit system is only one of the methods by which Congress envisaged that the Nation's waters would be protected. Beyond the NPDES scheme and the separate permit scheme regulating the discharge of dredged or fill material into the navigable waters (CWA § 404(a), 33 U.S.C. § 1344(a)), Congress left much of the task of preventing water pollution to the States, with federal guidance, assistance, and oversight. See THE CLEAN WATER HANDBOOK 191-220 (M. Ryan ed. 2003). Thus, States are responsible for establishing water quality standards. CWA



§ 303(a), 33 U.S.C. § 1313(a). And States are responsible for achieving those standards, principally by developing programs to manage nonpoint sources of water pollution. CWA §§ 303(d), 319(b), 33 U.S.C. §§ 1313(d), 1329; see *Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002). States pursue these goals through an integrated "continuing planning process" that takes into account local conditions. CWA § 303(e), 33 U.S.C. § 1313(e); see also CWA § 208, 33 U.S.C. § 1288.

Of particular relevance here, Congress drew a distinction between "pollutants" and "pollution." Pollutants—"dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste" (CWA § 502(6), 33 U.S.C. § 1362(6))—are the sort of waste materials that might be disposed of in water and that lend themselves to point-source-directed effluent limitations. "Pollution" is more broadly defined as any "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 502(19), 33 U.S.C. § 1362(19). Congress understood that the diversion of already polluted water may cause "pollution," but that it does not "add" a "pollutant" to the navigable waters "from" a point source. Accordingly, Congress expressly directed that "pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities"—precisely what is at issue in this case—would be regulated under States' non-point source programs. *Id.* § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F).

Congress took seriously these divisions of responsibility between the federal government and the States, reflecting a concern to maintain States' traditional powers over water

allocation and water and land use. The CWA thus declares that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the [Act]." CWA § 101(g), 33 U.S.C. § 1251(g). And Congress expressly chose "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* § 101(b), § 1251(b). The Clean Water Act, this Court recently observed, must be interpreted with Congress's intent to maintain the federal-state balance of powers firmly in mind. *SWANCC*, 531 U.S. at 166-167, 173.

Prior to the enactment of the CWA, countless flow diversion facilities operated around the Nation, including the pump station at issue here—built by the U.S. Army Corps of Engineers in the 1950s—and other devices critical to flood control and to water supply to urban centers, agriculture, industry, and flora and fauna. Congress nowhere suggested that its new NPDES permit program would regulate those facilities (which generally transferred water chemically different from the receiving water and so resulted in "pollution"). In the 30 years since, as water management features have increased in number with the country's growing population, EPA has not required that such facilities obtain NPDES permits to operate. As numerous public water management *amici* have explained, imposing an NPDES permit requirement now would wreak havoc, mandating costly, time-consuming, and burdensome bureaucratic proceedings to obtain permits, inviting litigation by anyone unhappy with the result, exposing water agencies to huge penalties for past violations, and interfering with the States' highly developed nonpoint source pollution programs—consequences never intended by Congress.



Everglades restoration—currently the subject of enormous effort and public expenditure—would in particular suffer if water diversion facilities became embroiled in the NPDES permit process. Review here will be aided by an understanding of the historical development of water management in the Everglades ecosystem, as well as the State and federal partnership that is now working towards its comprehensive restoration. This background is summarized before turning to the particular facts of this case.

### A. The South Florida Water Management District And Its Ecosystem.

The SFWMD is one of five water management districts with stewardship over Florida's public water resources. Fla. Stat. §§ 373.069, 373.016. Supervised generally by Florida's Department of Environmental Protection ("DEP"), the SFWMD establishes and implements the State's water policies from Orlando to Key West. *Id.* §§ 373.069(2)(e), 373.073, 373.016; J.A. Back Pocket.

The Florida legislature has established a goal that "[s]ufficient water be available for all existing and future reasonable-beneficial uses and the natural systems, and that the adverse effects of competition for water supplies be avoided." Fla. Stat. § 373.0831(2)(a). To achieve that goal the District is charged with developing dams, impoundments, reservoirs, and the like; storing water; establishing and maintaining minimum flows and levels for surface and ground waters; preserving natural resources, fish and wildlife; and allocating the state's waters to satisfy all reasonable beneficial uses. *Id.* §§ 373.016, 373.042.

The SFWMD's jurisdiction is drawn along hydrologic boundaries instead of political ones, to provide comprehensive water management for the regional South Florida ecosystem. Fla. Stat. § 373.069(2)(e); Water Resource Development Act of 1996 ("WRDA '96") P.L. 104-303 § 528(a)(4); J.A. 87-88 & Back Pocket. That ecosystem is an

immense, integrated, and unique system of hydrologically connected surface and ground waters extending over 15,000 square miles from central Florida's Butler Chain of Lakes, to the Kissimmee River, Lake Okeechobee, the Everglades, and south to the bays. J.A. 87-88, 170 ¶ 7; Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. No. 80-643, at 7 ¶ 2 (1948) ("H.R. Doc. 643"). "The individual drainage basins included in this area constitute, for all practicable purposes, a single watershed" because "their waters intermingle" and "their problems of water control and use, as well as their economic problems, are closely interrelated." *Id.* at 15 ¶ 4.

**B. Early Efforts At Everglades Reclamation.**

The Everglades in its natural state was a vast "grassy water" averaging forty miles across and encompassing some three million acres. H.R. Doc. 643 at 17. This immense wetland was supplied by overflow from Lake Okeechobee, seeping ground water, and localized rainfall, which flowed slowly southward over South Florida's flat landscape to the sea. *Id.* at 7, 16. The Everglades water table rose and fell, above and below the ground, its virtually indistinguishable surface and ground waters forming a single water system. J.A. 110-111, 117.

In 1850 the United States granted to the States "swamp lands and overflowed lands that were unfit for cultivation for the express purpose of constructing levees and drains to reclaim them." Swamp Lands Act, 43 U.S.C. § 982. More than 2.8 million acres of Everglades were subsequently transferred to Florida. H.R. Doc. 643 at 8. After failed private efforts at reclamation, a Drainage District was established in 1913. Laws of Florida ch. 6456 (1913). In following years, hundreds of miles of drainage canals were dug. EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 55 (S. Davis & J. Ogden eds., 1994); J.A. Back Pocket; H.R. Doc. 643 at 8. As these efforts reclaimed land from the Everglades, farming flourished, benefiting from fertile



organic "muck" soils and subtropical weather. Southeast Florida's population soared from 17,510 in 1910 to 214,830 by 1930. H.R. Doc. 643 at 5, 18-19.

These developments "altered the natural balance between water and soil." H.R. Doc. 643 at 32. As flammable muck soils were drained and dried out, thousands of acres were destroyed by fires. And "because of oxidation and decomposition when dry, the deep muck and peat soils * * * subsided from 3 to 6 feet" as the result of over-drainage. Lowering the water table also lessened lateral pressure against the ocean, allowing salt water to intrude and destroy coastal well fields and lands. "Between 1910 and 1942, the rate of salt-water encroachment in the aquifer was 235 feet a year in the Miami area." Numerous wells along the east coast had to be repeatedly moved. *Id.* at 30-36.

Disastrously, existing canals also proved incapable of controlling flooding. Over 2,500 people lost their lives in 1926 and 1927 hurricanes, and further catastrophic flooding occurred in 1947 and 1948. H.R. Doc. 643 at 9, 23-24, 26. "When the rains finally ceased [in 1947], ninety percent of southeastern Florida, from Orlando to the Keys, was underwater." U.S. Army Corps of Engineers, C&SF COMPREHENSIVE REVIEW STUDY 1-25 (1999) ("RESTUDY").

**C. The U.S. Army Corps Of Engineers' Central & South Florida Project.**

In 1939, Florida's Soil Science Society advocated new concepts for water management, decrying damage caused by reckless drainage, urging comprehensive water resource development, and calling for the reversion of large areas to wetlands by "re-watering." De Grove, CENTRAL AND SOUTH FLORIDA FLOOD CONTROL PROJECT 100-101 (1958). Congress adopted many features of the State's re-watering plan in 1948 when it established the Central and Southern Florida Project for Flood Control and Other Purposes ("C&SF Project"), administered by the U.S. Army Corps of

Engineers ("Corps"). Flood Control Act § 203, 62 Stat. 1176, P.L. 858, 80th Cong., 2d Sess. Florida's new Central & Southern Florida Flood Control District acted as the local sponsor for the Project. Fla. Laws ch. 25270 (1949).

The C&SF Project was a "comprehensive plan of improvement designed to remove excess water from urban, pasture, and farm lands, to conserve water for control of ground-water levels during dry periods, and to prevent overflow of the coastal areas by water from the Everglades." H.R. Doc. 643 at 9 ¶ 7. Four principal technologies were adopted to achieve these goals: levees, water storage areas, channel improvements, and pumps. Davis & Ogden, *supra*, at 60. The C&SF Project has developed into a complex water control system comprising over 2000 miles of levees and canals, approximately 1350 square miles of Water Conservation Areas (WCAs), and over 160 major water diversion structures, through which the SFWMD (which has succeeded the C&SF District as local sponsor) allocates the State's waters. RESTUDY at 1-10, 1-15; Fla. Stat. § 373.1501.

This case involves several C&SF Project components, which are delineated on the map reproduced in the back cover pocket of the Joint Appendix. The S-9 Pump Station, which the court of appeals held requires an NPDES permit, moves water from the C-11 Basin and Canal in developed western Broward County about 60 feet across the L-33 and L-37 Levees into Water Conservation Area 3—features we now describe.

**1. Water Conservation Area 3.**

The C&SF Project "created three interconnected reservoir areas." H.R. Doc. 643 at 42 ¶ 59(a). These huge impoundments are Water Conservation Areas 1, 2, and 3 (WCAs), which align with Everglades National Park and the historic southward flow of the Everglades. RESTUDY at 1-15 to 1-17; J.A. Back Pocket. The WCAs are bounded by levees which allow water to be maintained within them at higher levels



than in the surrounding areas. Maintenance of water in the WCAs raises the ground-water table, improves water supply for urban and agricultural uses, ameliorates salt-water intrusion in east-coast well fields and streams, and benefits fish and wildlife in the Everglades. H.R. Doc. 643 at 42-43 ¶ 59(a).

WCA-3 encompasses 915 square miles in western Broward and Dade counties. SFWMD & DEP, 2003 EVERGLADES CONSOLIDATED REPORT 1-2 ("CONSOLIDATED REPORT"). It contains undeveloped land, predominantly sawgrass marsh dotted with tree islands, wet prairies and aquatic sloughs. *Ibid.* The WCA-3 is managed by 11 levees, 19 gated spillways and culverts, and 3 pump stations. 4 U.S. Army Corps of Engineers, C&SF PROJECT MASTER WATER CONTROL MANUAL 2-6 to 2-11 ("CORPS MANUAL"). Water stored in WCA-3 is needed not only for urban and agricultural users, but for the long run restoration of the Everglades. J.A. 65-66; CONSOLIDATED REPORT at 1-1.

**2. Levees L-33 and L-37.**

Along Florida's lower east coast lies a sandy ridge, 5 to 10 miles wide, which formed the eastern border of the historic Everglades. H.R. Doc. 643 at 18. The C&SF Project constructed levees parallel to this coastal ridge, reclaiming the portion of the Everglades between the levees and the ridge. *Id.* at 42-43. These levees are a dual functioning dam,[1] providing for storage of water in the WCAs to the west while protecting the east coast from flooding. *Id.* at 42-43 ¶ 59(a)(1). The L-33 and L-37 levees separate WCA-3 from the C-11 Basin. J.A. Back Pocket. Before they were constructed the waters of the WCA-3 and C-11 Basin

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[1] A "'dam' means any artificial or natural barrier, with appurtenant works" that "obstruct[s] or impound[s] * * * any of the surface waters of the state." Fla. Stat. § 373.403(1).

intermingled and flowed together in a southerly direction as a single water body. Pet. App. 3a n.2, 8a n.8.

### 3. The C-11 Basin.

A drainage basin is a subdivision of a watershed, created to compartmentalize waters for management purposes. Fla. Stat. § 373.403(9); J.A. 67-68. The structures of the C&SF Project create numerous basins that for all practical purposes are a single, hydrologically connected watershed. H.R. Doc. 643 at 15; J.A. 67-68, 87-88. Basin lines are dynamic, being drawn and re-drawn to accommodate changes in water management regimes. See J.A. 108-109.

The C-11 Basin encompasses 104 square miles of western Broward County adjoining the WCA-3 and is divided into West and East sub-basins. J.A. 107, 110, 184-85. Before reclamation the C-11 Basin was part of the Everglades, remaining covered with surface waters year round and seldom drying out. J.A. 114, 172 ¶ 15. Today it is urban and agricultural in character, with significant residential areas. J.A. 172 ¶ 18. Its waters are highly controlled by C&SF Project canals, spillways, gates, and pumps along with water management systems operated by local drainage districts and residential developments.

### 4. The C-11 Canal.

The C&SF Project includes over 1000 miles of canals. RESTUDY at 1-10. The C-11 Canal runs east-west from the Miami canal in WCA-3 to tide waters in the east. J.A. 170-171 ¶¶ 5 & 10. It provides flood protection for the C-11 Basin, drainage for development, regulation of groundwater to prevent salt water intrusion, and allocation of water for irrigation and to recharge municipal well fields. J.A. 109. The C-11 Canal and WCA-3 are navigable Class III surface waters for recreation and propagation and maintenance of a healthy, balanced population of fish and wildlife. Fla. Admin. Code. § 62-302.400.



### 5. The S-9 Pumping Station.

C&SF Project pumping stations move and allocate water throughout the system. The S-9 pump station—which is the subject of this litigation—is one of three used to provide the WCA-3 with water for beneficial uses or for release to Everglades National Park. RESTUDY App. L, Sec. L-44; J.A. 65-66; CONSOLIDATED REPORT at 1-1. The S-9 pump is located at the intersection of the C-11 Canal and the L-33 and L-37 levees. J.A. Back Pocket. It moves water from the C-11 Canal about 60 feet across the levees into the WCA-3. J.A. 172 ¶ 14. The S-9 begins pumping when water in the C-11 Canal reaches four feet above sea level and stops pumping when it falls to one foot above sea level. 4 CORPS MANUAL at 7-5; J.A. 71-72.

The water in the C-11 Canal comes from a variety of sources. Because the water level in the WCA-3 is generally maintained much higher than water in the C-11 Basin, and because the underlying aquifer is uncontained, water continually seeps from WCA-3 into the C-11 Basin and is pumped back in cycles. J.A. 26, 37. Absent the S-9 pump, the C-11 Basin could flood within days from seepage alone. J.A. 172 ¶ 17; Pet App. 9a n.9. Water also reaches the C-11 Canal from upstream agricultural and urban runoff.

The water in the C-11 Canal that is pumped by the S-9 may contain pollution originating from upstream agricultural, residential, and other land uses. J.A. 116, 127, 133. No pollutants, however, are introduced from the S-9 pump to the water it conveys. Pet. App. 3a. The pump disposes of no waste or anything else, having the singular purpose of moving water as part of the State's areawide management of the Southern Florida ecosystem.

* * *

These components of the C&SF Project are operated by the District in accord with the CORPS MANUAL. The Corps and SFWMD work closely together as water levels and flows

are constantly adjusted to balance competing interests throughout the system. 4 CORPS MANUAL at 1-1. Through experience and scientific discovery, optimum seasonal water levels have been established in the Corps Manual for each canal and basin.

**D. Degradation Of The Natural System.**

Today, over five million people live along Florida's lower east coast, all of whom depend upon the C&SF Project to protect their homes and businesses from flooding and provide a stable water supply. In the C-11 West Basin alone, 136,000 people depend upon the S-9 pump to prevent flooding. 2000 CENSUS. The C&SF Project's remarkable success reclaiming land is undeniable.

Still, it is now understood that the C&SF Project has caused unintended degradation of the environment. Over the years, "[t]he Everglades have been reduced in area by half" and what remains "is in a continuing state of decline largely as a result of altered water regimes." RESTUDY at 3-1. As the Corps concluded (*ibid.*), the situation today

> can be attributed largely to a diminished capacity to retain the huge volume of water that once pooled and sheet flowed across the pre-drainage landscape. These waters are now either discharged in massive volumes through canal systems to tide or are stored at unnaturally high levels in [the WCA's]. In hindsight, many of these problems are now recognized to be unanticipated effects of the existing [C&SF Project]. They are exacerbated by the inescapable reality that people continue to move to south Florida at one of the highest rates in the nation. The result is a currently non-sustainable system of urban, agricultural and natural environments in south Florida that exceeds the capacity of, or is hampered by, the existing system of water management.



Water quality has been degraded as well. Urban and agricultural development has introduced pollutants into the ecosystem at rates that cannot be assimilated. The resulting imbalance of the ecosystem is manifest in declined faunal populations and an increase in invasive flora. See CONSOLIDATED REPORT at 1-8.

In view of these problems, SFWMD has worked closely with local, State and federal authorities to arrive at a solution to restore and preserve the Everglades while also addressing the complex water management issues that are so important in this region.

**E. Comprehensive Everglades Restoration.**

In 1972, when the SFWMD became local sponsor of the C&SF Project, its mission was expanded to include environmental protection and restoration in addition to water supply and flood control. Fla. Stat. §§ 373.016, 373.1501. The same year, Congress passed the Clean Water Act, creating federal and state programs aimed at restoring the integrity of the Nation's waters, including the development of state water quality standards. 33 U.S.C. § 1251 *et seq.*

Thirty years later, the South Florida ecosystem is in the midst of the largest, most comprehensive environmental restoration effort in history, including an unprecedented State and federal partnership at a projected shared cost of over $8 billion. See generally RESTUDY. Today's comprehensive restoration plans are still emerging from three decades of intense wrangling among competing interests coincident with the development of sufficient scientific knowledge to modify the C&SF Project in a way that can satisfy urban, agricultural and environmental needs.

The comprehensive restoration effort is being driven by an extraordinary array of agencies, coordinating groups and committees overseeing three initiatives: the Settlement Agreement, Florida's Everglades Forever Act, and the Corps' Restudy.

### 1. The Settlement Agreement.

In 1988, the United States sued Florida alleging that contamination caused by nutrient runoff into Everglades National Park and Loxahatchee National Wildlife Refuge (WCA-1) violated *State* pollution laws. *United States* v. *South Florida Water Management District*, No. 88-1886 (S.D. Fla.). Intervenors included respondent Tribe, environmental groups, cities, and agricultural interests. *Ibid.*

In 1991 Florida enacted the Everglades Protection Act, which authorized the District to establish strategies to bring its facilities into compliance with water quality standards, restore the flow of waters in the Everglades, conduct research programs, recommend discharge limitations, and engage in monitoring. Fla. Laws ch. 91-80; Fla. Stat. § 373.4592 (1991). These programs were to be part of SFWMD's comprehensive Everglades Surface Water Improvement and Management Plan ("SWIM"). *Ibid.* The Act also established the Everglades Protection Area (comprising all three WCAs and Everglades National Park) and a State stormwater permitting program for SFWMD structures discharging into that Area, including the S-9 pump. Fla. Stat. § 373.4592(2)(g); J.A. 181-183.

These programs far exceeded the relief sought in the USA lawsuit. In 1992, the court accepted a Settlement Agreement in that case which tracked the programs of the Everglades Protection Act. 847 F. Supp. 1567, 1570 (S.D. Fla. 1992). The settlement established an "ambitious strategy to restore and preserve the Everglades ecosystem." *Id.* at 1569. It remains monitored by the district court and overseen by a Technical Oversight Committee that plans, reviews, and recommends research, monitoring, and compliance. *Ibid.*; see also http://www.sfwmd.gov/org/ema/toc/about.html.

Florida moved expeditiously to comply with its obligations under the Everglades Protection Act and Settlement Agreement. In 1992, the SFWMD approved a



comprehensive Everglades SWIM plan while Florida's Department of Environmental Protection gave notice of intent to issue a permit for facilities discharging into the WCAs and developed a Best Management Practices Rule designed to reduce phosphorus discharges.

### 2. The Statement of Principles and Florida's Everglades Forever Act.

These efforts were confounded by an onslaught of litigation. The parties to these suits entered into mediation that culminated in 1993 with a Statement of Principles establishing several principles that have guided restoration ever since. These principles include Florida's commitment to increase water quantity to the Everglades, implement a detailed plan with specific construction schedules, and reduce phosphorus through Best Management Practices. Fla. Stat. § 373.4592(1)(c); Statement of Principles (July 1993).

The Statement of Principles became the basis for Florida's Everglades Forever Act ("EFA"), which established a partnership between Florida's DEP and SFWMD to develop and implement comprehensive, innovative solutions to Everglades restoration. Fla. Stat. § 373.4592(1)(e); see CONSOLIDATED REPORT at 1-6, http://www.sfwmd.gov/org/ema/everglades/index.html. The EFA's restoration program includes the Everglades Construction Project,[2] hydropattern restoration projects, research and monitoring, strict

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[2] The Everglades Construction Project, aimed at improving deliveries of water to the remaining Everglades, comprises six Stormwater Treatment Areas treating runoff from 769,000 acres, together with a modified drainage system for the Everglades Agricultural Area. Burns & McDonnell, EVERGLADES PROTECTION PROJECT CONCEPTUAL DESIGN ES-2 (1994); see http://www.sfwmd.gov/org/erd/ecp/3_ecp.html. It is the largest environmental restoration program of its type ever undertaken. Fla. Stat. § 373.4592(h).

regulatory programs, and exotic species control. CONSOLIDATED REPORT at 1-7.

Implementation of the Everglades Forever Act is monitored by a Joint Committee of the Florida legislature. Fla. Stat. § 11.80. Oversight is also provided by State advisory groups such as the Governor's Commission for the Everglades. Fla. Executive Order No. 99-144. The SFWMD has in addition established a Water Resources Advisory Commission comprised of governmental, tribal, business, agricultural, environmental, and public interest representatives to provide stakeholder input and recommendations regarding activities needed to restore the greater South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. SFWMD Resolution No. 01-22 (2001); http://www.sfwmd.gov/gover/wrac/ref_mat/priorityplan.pdf; http://www.sfwmd. gov/gover/wrac/members.html.[3]

### 3. The Comprehensive Everglades Restoration Plan.

In 1996, Congress directed the Corps, in cooperation with the District, to develop a comprehensive Everglades restoration plan. WRDA '96 § 528(b). To consult regarding development of this plan, Congress established the South Florida Ecosystem Restoration Task Force ("Task Force"), comprised of representatives from seven federal agencies, the Miccosukee and another tribe, and five state, regional, and local governments. WRDA '96 § 528(f); see http://www.

[3] Governance and planning within the SFWMD involve a myriad of federal, state, regional, and local agencies. This includes 16 county governments, 122 municipalities, two tribal governments, numerous special districts, six metropolitan planning organizations, five regional planning councils (South Florida, Southwest Florida, Treasure Coast, Central Florida, and East Central Florida), the SFWMD, five major state environmental planning and regulatory agencies, and 11 federal agency managers.



sfrestore.org. A multi-agency, multi-disciplinary team, including biologists, ecologists, economists, engineers, hydrologists, planners, public investment specialists, and real estate specialists participated in the project. RESTUDY at vi.

The Restudy, completed in 1999, recommended the $8 billion Comprehensive Everglades Restoration Plan ("CERP"). http://www.evergladesplan.org/pub/restudy_eis.cfm#mainreport. CERP calls for numerous structural and operational changes to the C&SF Project in order to restore the quantity, quality, timing, and distribution of water. CONSOLIDATED REPORT at 7A-3; http://www.evergladesplan.org/about/rest_plan_03.cfm. Implementation of CERP is overseen by a broad array of organizations, including the Task Force. See http://www.sfrestore.org. The Corps and SFWMD also jointly sponsor an interagency, interdisciplinary team to apply scientific and technical information in support of the objectives of CERP. See http://www.evergladesplan.org/pm/recover/recover.cfm.

## F. Restoration Projects Specific To Waters Managed By The S-9 Pump Station.

The Everglades Forever Act and CERP include several projects to improve the quality of water in the C-11 Basin pumped by S-9 to WCA-3.

*State Permits.* Because the S-9 pump discharges into the Everglades Protection Area it has been permitted by the State under the Everglades Forever Act. Fla. Stat. § 373.4592(9)(k) & (*l*); J.A. 179 ¶¶ 4, 5. The S-9 permit requires development of strategies to ensure that the facility meets all State water quality standards, including those for phosphorus, by the end of 2006. *Ibid.*; Fla. Stat. § 373.4592(10); see CONSOLIDATED REPORT at 8B-1 to 8B-20.

*C-11 West Critical Project.* A divide structure in the C-11 Canal is intended to isolate seepage entering from the WCA-3. A set of smaller pumps, S-9a, have been placed next to S-9 to return seepage to WCA-3 before it mixes with more

polluted runoff from the C-11 Basin. It is anticipated that phosphorus levels going into WCA-3 will be reduced by pumping seepage water and decreasing operation of the larger S-9 pumps. Burns & McDonnell, EVERGLADES PROTECTION AREA TRIBUTARY BASINS CONCEPTUAL PLAN 3-21 to 3-24 (2003) ("CONCEPTUAL PLAN").

*Western C-11 Impoundment and Diversion Canal.* A CERP project, scheduled for completion by January 2006 at a cost of $125 million, consists of a 1600 acre impoundment and stormwater treatment area within the C-11 Basin and eight miles of canal to divert flood waters to other storage areas. By storing more water in the C-11 Basin, this project will reduce the amount of pollutants entering WCA-3. *Ibid.*

*North Lake Belt Storage.* The North Lake Belt Storage is another CERP project designed for the dual purposes of storing water for water supply and diverting stormwater flows from being pumped by S-9 into the WCA-3. It is scheduled for completion in 2036. *Ibid.*

* * *

These comprehensive efforts are intended to resolve water quality problems. Both State and federal programs are designed to ensure that waters within and leaving the C-11 Basin fully comply with water quality standards. Neither EPA nor any of the governments' other agencies, committees or other groups involved in these efforts have ever suggested that NPDES should supplement or would contribute anything positive to existing comprehensive restoration efforts.

### G. Respondents' Suits And The District Court's Decision.

Dissatisfied with the comprehensive Everglades restoration planning process, the Miccosukee Tribe of Indians and Friends of the Everglades, Inc., filed Clean Water Act citizen suits challenging operation of the S-9 pump station without an NPDES permit. Plaintiffs contended that the diversion of water in the C-11 Basin through the S-9



pump into the WCA-3 is a "discharge" requiring an NPDES permit because the pumped water contains more phosphorus than the receiving water. The parties filed cross motions for summary judgment on the legal question whether pumping water through the S-9 pump station constitutes the "addition" of pollutants to navigable waters "from" a point source for which a NPDES permit is required.

The district court granted summary judgment to plaintiffs (Pet. App. 15a), holding that "it was not necessary for a conveyance to be the originator of the transferred contaminants" for there to be an "addition." Pet. App. 29a. The district court enjoined the transfer of water through the S-9 pump station without a NPDES permit. Pet. App. 31a-32a. The parties stipulated to a stay pending appeal because pumping is necessary to prevent catastrophic flooding of several municipalities in western Broward County. Pet. App. 12a n.12.

### H. The Eleventh Circuit's Decision.

The Eleventh Circuit reversed the injunction, finding that the lower court did not adequately consider the public interest. It affirmed the district court's judgment that the S-9 required a NPDES permit. Pet. App. 14a.

The court rejected in a footnote SFWMD's contention that NPDES applies only to point sources from which pollutants originate. Pet. App. 7a. n.6. It rejected the District's argument that a point source operator is not responsible for pre-existing pollution in the navigable waters, whether naturally occurring or introduced from other sources.

The Eleventh Circuit conceded that "[t]he S-9 pump station * * * adds no pollutants to the water which it conveys." Pet. App. 3a. The court declared, however, that an "addition" "from" a point source occurs any time the point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have

otherwise flowed, asking whether the pollutant would have reached the water body "but for" the operation of the point source. Pet. App. 7a-9a.

## SUMMARY OF ARGUMENT

**I.** The Eleventh Circuit's ruling that the SFWMD requires an NPDES permit to move water within its system whenever the diverted water is chemically different from the receiving water is contrary to the plain language, structure, and purposes of the Clean Water Act.

The plain import of Congress's carefully chosen words limiting the scope of the NPDES permit program—a permit is required only for the "addition" of a "pollutant" "from" a "point source"—is that it applies only when a pollutant originates from the point source, not when pollutants originating elsewhere merely pass through a flow diversion facility. The movement of water containing pollution that originated elsewhere is heavily regulated by the States under nonpoint source pollution prevention programs, which Congress approved in the CWA and which operate in a manner entirely different from the NPDES permit program.

Congress drew a clear distinction between federal permitting of the addition of "pollutants"—end of pipe discharges of industrial and municipal waste amenable to effective regulation by technology-based effluent limitations imposed in NPDES permits—and state nonpoint source regulation of "pollution," which is "the man-made or man-induced alteration of chemical, physical, biological, and radiological integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19). That diverting the flow of water containing pollutants originating elsewhere falls into the latter category is confirmed by Section 304(f)(2)(F), in which Congress specifically provided that any "pollution" resulting from "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or



flow diversion facilities," is nonpoint source pollution regulated by the States, not through the federal NPDES program. 33 U.S.C. § 1314(f)(2)(F); see H.R. Rep. No. 92-911 at 109 (1971) (Section 304(f) is an integral part of the effort to "control * * * pollution from such nonpoint sources as * * * natural and manmade changes in the normal flow of surface and groundwaters").

Any doubt that the NPDES program does not extend to the States' diversion of their waters is settled by three principles of statutory construction.

First, a clear congressional statement is required to alter the traditional federal-state balance of powers. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991); *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 166-167, 173 (2001). There is no clear statement in the CWA that Congress intended to subject traditional state control of water management and movements to federal permitting. To the contrary, Congress declared its intent to preserve the rights of the States to plan, develop and allocate their water resources. CWA § 101(b), (g), 33 U.S.C. § 1251(b), (g). The federal and state governments were given distinct roles under the CWA which should be upheld.

Second, the Eleventh Circuit's radical extension of NPDES and its substantial regulatory burdens to hundreds of thousands of state and local water control facilities around the country would have enormous and quite absurd consequences plainly not contemplated by Congress. These include the imposition of NPDES requirements on flow diversion facilities that are inconsistent with and undermine state nonpoint source pollution regulation, potentially huge penalties against public water management agencies for past and continuing violations of Section 402, potential criminal prosecution, and an exponential increase in the workload of permitting agencies far beyond their capacity to handle. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575

(1982). Particularly in light of these consequences, had Congress imagined that Section 402 reached commonplace and essential movements of water it would certainly have said so. It did not. Instead it specifically assigned regulation of pollution from changes in water movements, circulation, or flow diversion to state nonpoint source programs in Section 304(f)(2)(F).

Finally, under the "rule of lenity," the reach of Section 402 must be construed narrowly in light of the serious criminal penalties the Act imposes for violations. *Crandon* v. *United States Boeing Co.*, 494 U.S. 152, 168 (1990).

**II.** The Eleventh Circuit erred for a second reason. It properly recognized that, as a matter of plain meaning, moving water around within a single body of navigable water can never amount to an "addition" to the water body. The court concluded, however, that the historic Everglades—which the court appeared to concede was a single body of navigable water—had been subdivided by the C&SF Project facilities into separate and distinct water bodies, and that moving polluted water from the C-11 Basin and Canal to the CWA-3 impoundment constituted an "addition." That was error. As the United States told this Court in its brief filed at the certiorari stage (at 13), the "C-11 Canal and the WCA-3A can appropriately be viewed * * * as parts of a single body of water."

The unitary nature of the waters in the Everglades ecosystem, including those on either side of the S-9 pump station, is well established both scientifically and as a matter of law. The current basins, as the United States observed (at 13), "share a unique, intimately related hydrological association." An objective of CERP is to achieve even "greater system connectivity" and "sheetflow." RESTUDY at vii. Furthermore, the components of the C&SF Project "were created and are managed pursuant to legislative direction—by both the United States and the State of Florida—as part of a single integrated resource." U.S. Brief at 13-14. Moving



water around this system cannot constitute an "addition" and therefore does not require an NPDES permit.

## ARGUMENT

### I. THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM DOES NOT EXTEND TO STATE FLOW DIVERSION FACILITIES THAT DO NOT CONTRIBUTE POLLUTANTS TO THE NATION'S WATERS.

The Clean Water Act gave the Environmental Protection Agency authority under the National Pollutant Discharge Elimination Program to regulate the "discharge of pollutants into the navigable waters." CWA §§ 101(a)(1), 402, 404. For over 30 years EPA has required that permits be obtained by industrial, municipal and other dischargers of waste—and not by the hundreds of thousands of flow diversion facilities used by federal, state, and local governments to manage and allocate their waters. Nonetheless, according to the Eleventh Circuit a "discharge of pollutants" occurs whenever water is diverted between basins and the diverted water contains more or different pollutants than the receiving water—an activity routinely engaged in by public water managers throughout the country as they seek to fulfill the complex and often competing needs of flood control, preservation and enhancement of the environment, recreation, and water supply to residential, agricultural, and industrial users.

So expansive an interpretation of the NPDES program would have disastrous consequences, putting countless water control structures around the country—structures vital to the States' role as stewards of the Nation's waters—out of compliance with the CWA and requiring that they be permitted. That would expose water management agencies to huge penalties for past violations, like the $5.7 million penalty recently levied against New York City in *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), and even to

criminal prosecution. It would divert scarce government resources to permitting and interfere with the States' nonpoint source pollution programs. It would overwhelm already stretched permitting authorities with an enormous new category of work. And it would spawn a whole new area of wasteful litigation over the propriety of permits or permit terms.

None of this was contemplated by Congress when it adopted the CWA. The text, structure, purposes, and legislative history of the Act are clear and unambiguous. They show that Congress intended that pollution caused by changes in the movement of water would be regulated under state nonpoint source programs, not the NPDES.

## A. The Plain Language, Structure, And Purposes Of The Clean Water Act Show That NPDES Permits Are Not Required For The Mere Diversion Of Water Through The S-9 Pump Facility.

The terms used in the Clean Water Act do not extend the NPDES program to regulate flow diversion facilities like the S-9 pump station that convey water without disposing of any pollutants. Because the meaning of statutory language depends on context, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), we briefly outline the NPDES program before turning to more specific terms of the statute.

1. The CWA divides the causes and control of water pollution into two categories: (1) "point sources of pollutants" and (2) "nonpoint sources of pollution." *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165-166 (D.C. Cir. 1982). Point sources of pollutants—substances listed in CWA § 502(6), 33 U.S.C. § 1362(6) that are introduced "from" a point source—are regulated under the NPDES permit scheme established in Section § 402. Nonpoint sources of pollution—which are "defined by exclusion" and encompass "all water quality problems not subject to" point source regulation (*Gorsuch*, 693 F.2d at 166)—are regulated



under state water quality programs. CWA §§ 402, 303, 319, 33 U.S.C. §§ 1342, 1313, 1329; see *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988) ("State water quality standards are the basis of the 'nonpoint source' program"). These regulatory programs define distinct federal and state roles, satisfy different purposes, and use different strategies to achieve their goals. See *Arkansas* v. *Oklahoma,* 503 U.S. 91, 101 (1992); *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994).

The NPDES program was born of "the national goal that the discharge of pollutants into the navigable waters be eliminated." § 101(a)(1), 33 U.S.C. § 1251(a)(1). The CWA "aimed at achieving maximum 'effluent limitations' on 'point sources.'" *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204-205 (1976). It is unlawful for any person to "discharge a pollutant" without obtaining an NPDES permit and complying with its terms. *Ibid.* The NPDES permit serves to transform "generally applicable effluent limitations" into "obligations * * * of the individual discharger." *Ibid.*

"Effluent limitations" restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, * * * including schedules of compliance." 33 U.S.C. § 1362(11). As this Court has observed,

> [s]uch direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform.

*EPA*, 426 U.S. at 204-205. Effluent limitations are established and enforced applying the "best available technology economically achievable." § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A).

As we explain below, Congress plainly did not intend that this scheme requiring that point source pollutants be removed to the greatest economically feasible extent prior to discharge should apply to a State's diversions of its waters.

2. The starting point for interpretation is the language of the statute itself. *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Congress defined the "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." § 502(12), 33 U.S.C. § 1362(12). These terms—"addition," "pollutant," "from" and "point source"—are words of limitation, each of which must be given "operative effect." *United States* v. *Nordic Village*, 503 U.S. 30, 36 (1992). A court may not adopt an interpretation that gives this "limiting language * * * no office." *Jones* v. *United States*, 529 U.S. 848, 857 (2000).

Dictionary definitions provide guidance to the meaning of the statute. *Williams* v. *Taylor*, 529 U.S. 420, 431-432 (2000). An "addition" is "the result of adding; anything added; increase, augmentation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971). "From" is commonly "used as a function word to indicate * * * the starting point; as a point or place where an actual physical movement * * * has its beginning * * * [or] the starting or focal point of any activity or movement, * * * [and] the place of origin, source or derivation of a material or immaterial thing." *Ibid.* "Source" means "the point of origin of a stream of water" and "origin." *Ibid.*

Read together, the terms "addition," "from" and "point *source*" most naturally mean that a "discharge" occurs when the pollutant originates from the point source, not when



pollutants originating elsewhere are merely passed through. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-133 (1985) ("Congress recognized" in the CWA that to achieve its goals "it is essential that discharge of pollutants be controlled *at the source*") (emphasis added) (quoting S. Rep. No. 92-414, at 77 (1971)); *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) ("Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges do not constitute an addition of pollutants by a plant through which they pass"); *Admiral Ins. Co.* v. *Feit Mgmt. Co.*, 321 F.3d 1326, 1329 (11th Cir. 2003) (the "ordinary and plain meaning" of "from" is "originating in" or "produced by," not "through" or "by way of"). The S-9 pump station is not the "starting point," "source," or "origin" of any pollutants. Any pollutants are added to the navigable waters of the C-11 Canal from other "sources" within the surrounding area or already exist in the environment. Pet. App. 3a. The District's operations do not increase or augment the amount of pollutants in the navigable waters. *Ibid.*

Reading this statutory language in *Gorsuch*, Judge Wald concluded in her opinion for the D.C. Circuit that "it does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, 'all pollution released through a point source.' Instead, * * * the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source." 693 F.2d at 176. Such an "addition" "occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175; see also *Consumers Power*, 862 F.2d at 586 (same).

3. This plain reading of the statute draws support from Congress's choice, when defining the scope of the NPDES program in Section 402, to use the term "pollutants" rather than "pollution." "Pollution" is "the man-made or man-induced alteration of chemical, physical, biological, and

radiological integrity of water" (CWA § 502(19), 33 U.S.C. § 1362(19)), a broad definition that might well encompass the diversion of water in this case. "Pollutant," much more narrowly defined, "means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, celler dirt and industrial, municipal, and agricultural waste discharged into water." CWA § 502(6); see *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979) (a definition declaring what a term "means" excludes any meaning not stated). This more restrictive definition tailors the NPDES program to its goal of eliminating the disposal of physical substances or "waste" that typically discharge from industrial and municipal activities. See *Gorsuch*, 693 F.2d at 175 ("Throughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes"); *Association to Protect Hammersley, Eld, & Totten Inlets* v. *Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002) (pollutants are "waste material of a human or industrial process"). The movement of water through the S-9 does not dispose of anything into the waters. Pet. App. 2a-3a.

Under these definitions, a "pollutant" once discharged to the navigable waters becomes "pollution." Had Congress required an NPDES permit for "*pollution* by a point source," it might more nearly have captured the diversion of polluted water into more pristine water. But Congress required a permit only for the discharge of a pollutant, which is not involved in such a diversion. The use of the two different terms is presumed to be intentional, see *Russell* v. *Law Enforcement Assistance Admin.*, 637 F.2d 354, 356 (5th Cir. 1981), especially when the legislation specifically defines both terms. *Gorsuch*, 693 F.2d at 172.

The term "point source" is also telling. A "point source means any discernible, confined and discrete conveyance, * * * from which pollutants are or may be discharged." CWA



§ 502(14), 33 U.S.C. § 1362(14). That definition evokes "images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *United States* v. *Plaza Health Labs.*, 3 F.3d 643, 646 (2d Cir. 1993) (describing CWA's emphasis upon industrial and municipal wastes). That focus makes sense, for "[i]ndustrial and municipal point sources were the worst and most obvious offenders of surface water quality" and "the easiest to address because their loadings emerge from a discrete point such as the end of a pipe." *Ibid.*, quoting David Letson, *Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey*, 32 NAT. RESOURCES J. 219, 221 (1992). The District's movement of polluted water, not to dispose of pollutants but to achieve public goals of flood control, water supply, protection of aquifers from salt water incursions, recreation, and environmental protection, bears not the least resemblance to the point source waste disposal that was Congress's principal target in Section 402 of the Act.

4. The Eleventh Circuit's conclusion that an addition occurs whenever a "point source changes the natural flow of a water body" (Pet. App. 7a-8a) also cannot be squared with § 304(f) of the CWA, 33 U.S.C. § 1314(f), which provides:

> **(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution.** The [EPA] Administrator, after consultation with appropriate Federal and State agencies * * *, shall issue * * * (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from— * * *
>
> > (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of

> dams, levees, channels, causeways, or flow diversion facilities.

In that provision, Congress expressly identified "changes" in the "movement" or "flow" of navigable waters or ground waters to be *nonpoint* sources of *pollution* that are not governed by the NPDES permit program and placed them on a short list for attention. See also Part I.B.2, *infra*. As a result, EPA issued guidance that addresses the very type of pollution at issue here—"increased pollution from the use of flood protected and drained land." EPA, THE CONTROL OF POLLUTION CAUSED BY HYDROGRAPHIC MODIFICATIONS 13 (1973).

Concern with the effects of dams and other water diversions is also embodied in EPA regulations, which expressly require existing dams and diversions to be operated to attain state water quality standards. 40 C.F.R. § 131.10(g)(4)(1992); see *PUD No. 1*, 511 U.S. at 719. It is clear that Congress intended flow diversions be managed through state water quality standards and local planning programs, not NPDES effluent limitations—the practice for the past 30 years.[4]

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[4] *United States* v. *M.C.C. of Fla.*, 772 F.2d 1501 (11th Cir. 1985), vacated, 481 U.S. 1034 (1987), and *Dubois* v. *United States Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 2001), on which the Eleventh Circuit relied, do not contradict this conclusion. Both involved uses of the navigable waters that went far beyond changing the movement, circulation or flow of water. In *M.C.C.*, a boat's propellers were used to rip up sediment and dispose of the dredged spoil in navigable waters. 772 F.2d at 1505-1506. In *Dubois*, navigable waters were taken for use in snowmaking equipment, then discharged as wastewater when the process was complete. 102 F.2d at 1296-1297. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481 (2d Cir. 2001), on which the court below also relied, is wrong for the same reasons that the Eleventh Circuit's decision is erroneous.



5. The CWA contains detailed provisions describing categories of facilities that need permits, what levels of treatment are required for each category, and what EPA must do concerning each. 33 U.S.C. § 1311(b)-(m) (effluent limitations for different categories of point sources); § 1314(b), (d) (level of treatment required for industrial and municipal point sources); § 1316(b) (categories of point sources required to meet new source performance standards). Nothing in those statutory provisions addresses a state agency's diversion of water for flood control, water supply, environmental protection, and other public purposes.

6. EPA, the federal agency responsible for administering Section 402, has never treated flow diversion facilities like the S-9 pump as requiring NPDES permits. As this Court has recognized, the CWA required EPA "to publish regulations providing guidance for effluent limitations on existing point sources." *E.I. Du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116 (1977). When EPA promulgated those regulations, at 40 CFR Parts 400-471, *none* even remotely applied to a state water diversion facility like the S-9 pumps.

In fact, for over 30 years, EPA has consistently shared Petitioner's understanding of what constitutes an "addition" "from" a "point source," never suggesting that mere water diversion facilities require NPDES permits whenever they transfer water with a different chemical makeup than the receiving water. In *Gorsuch*, for example, the D.C. Circuit observed that "[i]n [EPA's] view, the point or nonpoint character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water * * * to another." 693 F.2d at 175; EPA *Gorsuch* Br. 23-24 (conceding "EPA's lack of authority under the NPDES program to control pollutants occurring naturally in the waterway or previously added by other sources"). And in *Consumers Power*, the Sixth Circuit noted EPA's view that "there can be no addition unless a source

physically introduces a pollutant into water from the outside world." 862 F.2d at 584; see also Pet. App. 43a-48a (Florida DEP's views). The courts in *Gorsuch* and *Consumers Power* adopted EPA's position, and Congress has never amended the statute to disavow that interpretation of the Act. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599-601 (1983); *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979) (congressional inaction or silence may support an inference that Congress approves an agency interpretation).

**B. Legislative History Confirms That The NPDES Program Is Limited To Sources Of Pollutants And Does Not Address Pollution Caused By Water Diversions.**

1. Legislative history confirms that Congress intended the NPDES program to regulate "sources" from which pollutants originate, not water control structures used to change the flow of and otherwise control waters. Earlier legislation prohibited only industrial discharges of "refuse" that interfered with navigation. Rivers and Harbors Appropriation Act of 1899 § 13 ("Refuse Act"), 33 U.S.C. § 407. In developing Section 402, Congress "extracted from the Refuse Act the basic formula and added municipal discharges to it, so that before any material can be added to the navigable waters authorization must first be granted * * * under Section 402." S. Rep. No. 92-414 at 76 (1971), reprinted in 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT OF 1972, Ser. No. 93-1, at 1415, 1494 ("1972 LEG. HIST."). In expanding the range of polluting materials subject to control, Congress's target remained the *originator* of those materials, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled *at the source*." *Id.* at 77, 1972 LEG. HIST. at 1495 (emphasis added). See also *id.* at 73, 1972 LEG. HIST. at 1491 (Congress "concentrate[d] on the control of pollutants *placed in* surface waters") (emphasis added); *id.* at 70, 1972 LEG. HIST. at 1488 (Section 402 seeks "to control,



on a source by source basis, the discharge of pollutants into the navigable waters").

2. Legislative history also confirms Congress's intention to leave the regulation of nonpoint source pollution generally to state land and water use planning programs:

> In 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process * * * judging that those matters were appropriately left to the level of government closest to the sources of the problem.

S. Rep. No. 95-370 at 8-9 (1977), reprinted in 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, Ser. No. 95-14 ("1977 LEG. HIST."). As reflected in the comments of Senator Muskie, the primary sponsor of the legislation in the Senate, programs developed to deal with nonpoint sources "would involve land use and other controls of that kind." Senate Debate on S. 2770, 1972, 1972 LEG. HIST. at 1314.

Most telling, in describing its direction to EPA to issue information on processes, procedures, and methods to control pollution caused by flow diversion facilities under § 304(f)(2)(F), Congress expressly identified "natural and man-made changes in the normal flow of surface and ground waters" as "nonpoint source" activities that are subject to state nonpoint source programs rather than the NPDES program. H.R. Rep. No. 92-911 at 109 (1971), 1972 LEG. HIST. at 796.[5]

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[5] Section 304(e) [later (f)] addresses the problem of nonpoint sources of pollution. This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. If our water pollution problems are truly to be solved, we are going to have to

### C. Ordinary Principles Of Statutory Interpretation Establish That The NPDES Program Does Not Apply To Water Diversion Facilities.

Even if the text and history of the CWA did not so clearly contradict the Eleventh Circuit's decision, three rules of statutory interpretation resolve any doubt on the matter, establishing that the NPDES program does not extend to the movement of water by facilities from which no pollutants originate.

#### 1. A Plain Statement From Congress Is Required To Displace Traditional State Jurisdiction Over State Water Management And Is Lacking Here.

A fundamental rule of statutory construction is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see also *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (a federal statute does not supersede "the historic police powers of the States * * * unless that was the clear and manifest purpose of Congress"); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

This Court has applied the "clear statement rule" to determine the meaning of provisions of the Clean Water Act. *SWANCC*, 531 U.S. at 173. In fact, the Court has a "particular duty to ensure that the federal-state balance is not

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> vigorously address the problems of nonpoint sources. The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as * * * natural and manmade changes in the normal flow of surface and groundwaters.
>
> 1972 LEG. HIST. at 796.



destroyed" with respect to "traditional concern[s] of the States" such as water management and allocation. *United States* v. *Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring). That duty is heightened in the case of the CWA because Congress made explicit its "policy * * * to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b), 33 U.S.C. § 1251(b).[6] Congress further directed that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. CWA § 101(g), 33 U.S.C. § 1251(g).

Far from making a "clear statement" explicitly stripping the States of their traditional powers over water management and land use planning, the CWA recognized that the state and federal governments have distinct roles to play. *PUD No. 1*, 511 U.S. at 704. While federal agencies are responsible for the permit programs under Sections 402 and 404, the States are responsible for establishing water quality standards. CWA § 303, 33 U.S.C. § 1313. States seek to achieve those standards by establishing Total Maximum Daily Load allowances ("TMDLs") for waters for which point source effluent limitations have proved insufficient, and by "develop[ing] and implement[ing]" programs to manage nonpoint sources of water pollution "on a watershed-by-watershed basis." CWA §§ 303(d), 319(a)-(c), 33 U.S.C.

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[6] The States' traditional interest in water management is at its peak where the control of pollution in urban and agricultural basins—as in this case—implicates both water and land use planning. See EPA, THE CONTROL OF POLLUTION CAUSED BY HYDROGRAPHIC MODIFICATIONS 144 (1973) (describing land use regulation as a control for urban runoff). This court has long recognized States have traditional and primary power over both land and water use. See *SWANCC*, 531 U.S. at 174 (citing authority).

§§ 1313(d), 1329(a)-(c); see *Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002). In pursuing those goals, States engage in a watershed-specific "continuing planning process" that responds to the features of the watershed and other local conditions. CWA § 303(e), 33 U.S.C. § 1313(e); see also CWA § 208, 33 U.S.C. § 1288. See generally THE CLEAN WATER ACT HANDBOOK, *supra*, at 191-220.[7]

Congress contemplated that the very mechanisms—dams, levees, channels, causeways, and flow diversion facilities—by which the States manage and allocate their waters would be addressed, insofar as they cause pollution, by the States as nonpoint sources of pollution under these programs. See Part I.A.4, *supra*; CWA § 304(f)(2)(F).

Florida has been a leader in water resource management since passage of the Florida Water Resources Act of 1972. Fla. Stat. ch. 373. It has adopted stringent general water pollution laws (Fla. Stat. ch. 403), as well as ambitious specialized laws targeting specific watersheds. See, *e.g.*, Fla. Stat. § 373.4592 (Everglades Forever Act), § 373.4593 (Florida Bay Restoration), § 373.4595 (Lake Okeechobee Protection Program). Florida's Everglades Forever Act established the world's largest environmental restoration and protection effort aimed specifically at developing, implementing, and financing protections from urban and agricultural development in lands drained or otherwise

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[7] Virtually every state has developed general discharge prohibitions. Environmental Law Institute, ENFORCEABLE STATE MECHANISMS FOR THE CONTROL OF NONPOINT SOURCE WATER POLLUTION (1997). "[U]nlike the federal act many of these can be applied to nonpoint source pollution because they lack the limitation in 33 U.S.C. § 1362(12) which defines 'discharge of a pollutant' as 'from any point source.'" *Id.* at 9. State programs reveal a great variety of approaches reflecting varying economic activities and particular goals for the watersheds for which they must plan water and land uses. See *id.* at 55.



affected by the C&SF Project. The Everglades program produced the comprehensive CONCEPTUAL PLAN and other programs which deal with the pollution problems caused by the S-9 and its related structures on a watershed wide basis. Statement Parts E, F, *supra*.

These efforts are now in jeopardy of being trumped, their implementation at least seriously delayed, by a federal NPDES permitting process. The Eleventh Circuit's expansion of the scope of the NPDES permit program to water diversions that originate no pollutants tramples on the States' own efforts to deal with water allocation, use, and pollution using state powers that Congress explicitly meant to "preserve and protect," including powers specifically recognized in CWA Sections 208, 303(d), and 319. Interjection of a federal permitting requirement into States' water and land use planning processes—Florida's in particular—would be unnecessarily burdensome to regional multi-agency planning and an affront to the powers that States have long exercised in this area.

Nothing in Section 402 evinces the slightest intent to extend NPDES beyond its traditional industrial and municipal targets to reach state water diversions, for which Section 304(f) contemplates nonpoint source treatment. Absent a clear statement from Congress, the CWA cannot properly be interpreted to impose a burdensome federal permitting scheme on the operation of the C&SF Project and the current carefully laid plans to preserve the Everglades for future generations through major changes to the existing water management regime.

### 2. The Application Of NPDES To Water Diversion Facilities Would Lead To Absurd And Disastrous Results That Would Thwart Congress's Purposes.

The Eleventh Circuit's interpretation of Section 402 should also be rejected because it leads to absurd, wholly impracticable results that would undermine the entire regime

of nonpoint source regulation. *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

1. The court of appeals' declaration that a "receiving body of water is the relevant body of navigable water" is revolutionary. Pet. App. 6a. Watersheds are divided and often re-divided into basins for ever-changing water management needs. J.A. 108-109. Flow diversion facilities are constantly moving water to and from areas "it would not have otherwise flowed." Since all waters no matter how clean contain pollutants,[8] every inter-basin transfer becomes—under the Eleventh Circuit's analysis—a "discharge of pollutants" to the receiving water subject to the NPDES permit process, regardless whether the basin was separated by man or naturally and whether the receiving waters are cleaner or dirtier than those conveyed. Since NPDES prohibits the addition of "*any*" pollutant, not only those that exceed water quality standards, the transfer of *any* water becomes a discharge under the Eleventh Circuit's interpretation. A "movement" becomes an "addition" and "navigable waters" become "pollutants." The "navigable waters" are treated on par with industrial and municipal waste. Every federal, state, regional, and local agency charged with managing a State's waters is subjected to NPDES every time it determines the public interest is served by moving them, necessitating

[8] Every body of water contains distinct constituents. See Brian J. Skinner & Stephen C. Porter, PHYSICAL GEOLOGY 283-285 (1987). The D.C. Circuit in *Gorsuch* explained, for example, that the very act of damming a river changes the constituents of the water above the dam, so that water going over the dam has different pollutants than the receiving water. See 693 F.2d at 161-164 (discussing "a variety of interrelated water quality problems, both in the reservoirs and in the river water downstream from a dam," caused by dams, and concluding that "[d]ams affect environmental quality in a large number of ways, both good and bad").



hundreds of thousands of additional NPDES permits across the country.

2. By ignoring the line Congress drew between point and nonpoint sources, the court of appeals has pitted NPDES—the program designed to eliminate the flow of pollutants into the Nations waters—*against* CWA-approved state planning processes established to ensure that both water quantity and quality needs are met through comprehensive watershed planning and control systems. NPDES targets wastewater outflows by imposing maximum "effluent limitations." *EPA*, 426 U.S. at 204; 33 U.S.C. § 1311(b), (c). Those technology-based effluent limitations require compliance without consideration of local water resource planning and wildlife management goals. It is well recognized that water control structures allow urban and agricultural uses on the lands they reclaim and that those uses affect water quality. EPA, THE CONTROL OF POLLUTION CAUSED BY HYDROGRAPHIC MODIFICATIONS (1973). If the decision below stands, the planned solution to those problems—traditionally state regulatory strategies, best management practices, land use planning, urban waste management, public education, and ground water controls—will be replaced with technology-based effluent limitations that give no consideration to quantity requirements not only of urban and agricultural areas, but of the environment itself.

Unlike industrial or municipal wastewater outflows, which are continuous and of known quality, discharges from water control structures are highly variable in timing and constituents. The SFWMD's pump stations, levees, canals, and impoundments are major components of the State's overall water management, providing water supply, protection from salt water intrusion, flood control, and environmental protection. Use of these water control structures are very site specific, varying with local circumstances, seasonal and meteorological conditions, Florida's infamous cycles of rain and drought, and water

supply needs. Only through nonpoint source programs does the State have the flexibility to maintain the benefits of the C&SF Project in balance with its detrimental effects on water quality. Trying to apply NPDES point source permits is unsound scientifically and economically. NPDES is simply not designed to handle these complexities for which areawide water quality plans are the better regulatory tool. *Gorsuch*, 693 F.2d at 182. That is why Congress recognized in CWA Section 304(f)(2)(F) that nonpoint source programs provide far more appropriate mechanisms to oversee state water management facilities.

3. The Comprehensive Everglades Restoration Project would be undermined if elements of the project were subject to NPDES permitting rather than, as Congress envisioned, addressed as part of the overall plan to restore natural flows and advance other beneficial purposes for which the movement of water is imperative. In CERP, Congress adopted an $8 billion plan to modify the C&SF Project to restore the South Florida Ecosystem. CERP is a cornerstone of the State's Everglades restoration and water quality strategy. A recommended Comprehensive Integrated Water Quality Plan links water quality and hydrologic restoration for the entire ecosystem. RESTUDY 9-53. Together, the federal and State agencies are working to redirect flows, to conserve and store water otherwise wasted to tide, and to manage water quantity for the benefit of the whole ecosystem. New reservoirs, impoundments, and controls are being constructed with old canals, levees, and structures being removed or moved. Changing the movement of water throughout the C&SF system is critical to the survival of the Everglades and the success of CERP.

The CERP project has undergone unprecedented oversight and review. Congress will determine as CERP is implemented exactly how the problems of the Everglades water quality will be resolved and how costs will be apportioned. At no point did Congress or the agencies



consider the application of the NPDES and its effluent-based standards an appropriate method of achieving those goals. In fact, CERP and State planners specifically addressed the S-9 pump station and have recommended alternative remedies aimed at redirecting flows to other areas for multiple purposes that NPDES will not accommodate. Statement, *supra*, Part F. The application of NPDES at each structure would conflict with many of CERP's goals of environmental improvement by restricting water flows—the very purpose of NPDES—or imposing technological treatment requirements that are different from the planned consensus solution and that would dramatically increase restoration costs and time. NPDES would only adds a lengthy and burdensome permitting process for every structure, which would in turn result in additional time- and resource-consuming litigation by those dissatisfied with CERP.

And CERP is but an example of the disruption that would be caused by the Eleventh Circuit's rule in Florida and across the Nation. "The core nonpoint water pollution control programs under the [CWA] have been augmented by provisions of the [Coastal Zone Act Reauthorization Amendment], continuing development of TMDL's, enforcable state mechanisms, traditional land use planning, and innovative new solutions such as water quality-based trading." THE CLEAN WATER ACT HANDBOOK, *supra*, at 204. EPA acknowledges with respect to nonpoint source pollution that "[f]inding solutions to these complex water quality problems requires [such] innovative strategies." EPA Office of Water, PROPOSED WATER QUALITY TRADING POLICY Part I (2002).

Florida has responded with regulatory programs of remarkable scope in its Everglades Forever Act (Fla. Stat. § 373.4592), the joint federal-state Comprehensive Everglades Restoration Plan (the RESTUDY), Florida's Water Resources Act (Fla. Stat. ch. 373), and Florida's Pollution Control Act. Fla. Stat. ch. 403. Water quality standards have been developed for all water bodies within the state. Fla.

Admin. Code ch. 62-302. Water quality management plans have been drawn on a watershed-by-watershed basis under CWA Section 319(b)(4). Florida is actively developing TMDL programs to further account for point source and nonpoint source flows on a systemic level. Fla. Stat. § 403.067(1). Elements of Florida's Section 208 area-wide plans are incorporated into the State's overall continuing planning process. CWA § 303(e)(3)(B), 33 U.S.C. § 1313(e)(3)(B). The State's plans under Sections 208 and 303(e) will ultimately be incorporated into an overall Water Quality Management Plan under regulations promulgated by EPA. 40 C.F.R. pt. 30 (2001).

This entire panoply of nonpoint source mechanisms and planning strategies is now threatened with the imposition of effluent limitations on a structure-by-structure basis. For over 30 years the federal and state governments together have toiled to develop and improve complex strategies to deal with one of the most important and challenging issues facing the States. It is unfathomable that, by federal judicial decree, NPDES processes, procedures, and standards should now all of the sudden be substituted. "The control of non-point source pollution is a study in classic federalism. * * * As each state strives to achieve control over [nonpoint] sources, 50 potential programs are in the process of development, experimentation, and implementation. Eventually, efficient and successful programs will arise out of the experimentation and an overall control strategy may be developed." THE CLEAN WATER ACT HANDBOOK, *supra*, at 202. That will not occur if state efforts are trumped by the NPDES program.

4. The Eleventh Circuit's view that to fall under Section 402 "the point source does not necessarily have to be source or origin of pollutants" improperly shifts responsibility away from the original sources of pollutants to those that must manage the waters for the public good. See *Appalachian Power*, 545 F.2d at 1377 (it is beyond EPA's authority to require treatment of pre-existing pollutants not added from



the facility through which they pass). If the NPDES permit program applies, SFWMD will be responsible, under threat of civil penalty or criminal sanction, to treat the collective discharges from all point and nonpoint within each basin from which it moves water. Pet. App. 14a; 33 U.S.C. § 1319. The decision below thus makes the District legally responsible for pollutants added by thousands of urban, industrial, and agricultural activities.[9] That shift of responsibility and burdens away from the sources at which pollutants originate contradicts Congress' focus upon regulating pollution at its *source*.

What makes this result even more absurd is that under the Eleventh Circuit's rule the District has been violating the CWA for decades by operating water control devices without NPDES permits. If the court of appeals decision stands, the SFWMD could find itself in the same situation as New York City, which was recently fined $5.7 million (out of a maximum possible civil penalty of $63 million) for operating a water supply system through which it had transferred water for 70 years and upon which the City of New York greatly depends. *Catskill Mountains* v. *New* York, 244 F. Supp. 2d 41, 46 & 57 (N.D. NY 2003). And the District will have to

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[9] According to the Eleventh Circuit, the District could escape the need to apply for an NPDES permit for diverting water containing pollutants previously introduced by others if it could show that each source was either itself permitted or was exempt from permitting (for example, as return flows from agricultural irrigation). *Fishermen* v. *Closter Farms*, 300 F.3d 1294, 1297 (11th Cir. 2002). To state this approach it to recognized its utter absurdity. Such an intensive factual and legal inquiry into the source and permitting or exempt status of every pollutant in the transferred water would be an incredibly burdensome, wasteful, and likely impossible task that would consume vast resources. Congress nowhere so much as hinted that the need for an NPDES permit turned on so impractical an inquiry being repeated, over and over again, for every flow diversion facility.

deal with efforts to impose liabilities for inevitable future violations as well. Events from accidents to hurricanes to droughts radically affect water quality within the C-11 basin. The SFWMD simply cannot control everything that gets into its waters and, therefore, whether water quality standards can always be maintained.

5. The Eleventh Circuit decision replaces the clear line drawn by Congress between point sources of pollutants and nonpoint sources of pollution—a line that has governed water management for 30 years—with a test that will require factually intensive inquiries into whether the waters are "distinct" and whether they would or would not reach each other "but for" the point source. Such a test is fraught with untenable practical complications and implications.

The Eleventh Circuit's test begs the question as to what constitutes a "distinct" water body into which the movement of water will now require a permit. Under the court of appeals' analysis, it was apparently irrelevant that the waters in the C-11 Canal and WCA-3 are all part of the same natural system, separated only by a manmade levee. Instead, whether the waters are "distinct" turns upon whether they would presently flow together, or whether the diversion facility followed or changed the natural flow of the water. Pet. App. 7a. But all water control facilities—dams, levees, channels, causeways, and flow diversion facilities—by their very nature change natural flow. Levees are built to divide and separate waters. Scarcely any public water management system would escape NPDES regulation under the Eleventh Circuit's rule.

* * *

Given the host of serious practical problems that follow from the Eleventh Circuit's approach, one is "struck by what Congress did not say." *Rewis* v. *United States*, 401 U.S. 808, 811-812 (1971). "Congress would certainly recognize" the practical impact of extending NPDES permitting to virtually



every diversion of water throughout the Nation, including its "alter[ation of] sensitive federal-state relationships." *Id.* at 812. "[T]he fact that [this impact is] not" expressly addressed in the statute or "even discussed in the legislative history * * * strongly suggests that Congress did not intend" to reach so far. *Ibid.*

### 3. The CWA's Severe Criminal Penalties Require That It Be Narrowly Construed.

The CWA is enforceable through criminal as well as civil penalties. Pet. App. 14a. Violations carry fines up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). Under the Eleventh Circuit's interpretation, anyone managing navigable waters so as to change their natural flow and divert water into another "distinct" water body commits a criminal offense.

Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). These rules apply in civil cases to statutory provisions, like Section 402, that have both criminal and civil consequences. See *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (applying the rule of lenity to interpret a "tax statute [with] criminal applications"; the rule is one "of statutory construction[,] * * * not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation"); *id.* at 519 (Scalia and Thomas, JJ., concurring). Because the Eleventh Circuit's conclusion that pollutants do not have to originate from the point source is hardly an "unambiguously correct" interpretation of the CWA (*United States* v. *Granderson*, 511 U.S. 39, 54 (1994)), and because that expansive interpretation exposes Petitioner and countless other public water

managers to criminal sanctions, the rules of lenity and strict construction require it be firmly rejected.

## II. A STATE'S DIVERSION OF WATER FROM ONE TO ANOTHER PART OF A SINGLE NAVIGABLE WATER LIKE THE EVERGLADES ECOSYSTEM INVOLVES NO "ADDITION" AND THUS FALLS OUTSIDE THE NPDES SCHEME.

The Eleventh Circuit's decision may also be reversed for another, independent reason. The court of appeals erred in concluding that the S-9 pump moves water between "distinct" water bodies. Pet. App. 7a. The undisputed record and a long history of statutory and regulatory enactments shows beyond question that the water on either side of the S-9 pump is part of a single body of navigable water, so that moving water from one side to the other cannot involve any "addition" of pollutants covered by Section 402.

The Eleventh Circuit properly recognized that moving water around *within* a water body cannot result in an "addition." Pet. App. 6a. As the Court in *Catskill* explained,

> [t]he *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of "addition," assuming that the water from which the discharges came is the same as that to which they go. If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot * * *. In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagara Falls.

273 F.3d at 492. Nothing about moving water around within the same water body "increases" or "augments" the pollution pre-existing within the water system. WEBSTER'S THIRD; see *supra*, Part I.A.2.

The Eleventh Circuit acknowledged that the C-11 Basin from which the S-9 draws water and the WCA-3 into which it



moves that water were part of the historical Everglades. Pet. App. 8a n.8. But the court's supposition that the C&SF Project levees, impoundments, canals, and pumps destroyed that single ecosystem by creating separate and distinct navigable waters is simply wrong. The waters on either side of the S-9 remain part of a single Everglades water system.

The undisputed unitary nature of these waters is well established by the consistent understanding of the scientific community and the consistent treatment of the waters as part of a single system by State and federal regulators and legislatures. The levees, pump station, canal, and impoundment at issue here are part of a larger, interlocking system to control the waters of the South Florida ecosystem, including the Everglades. See *supra*, Statement Part C. Surface and ground waters (which respondents' own water experts described as virtually indistinguishable) naturally flow together from the Butler Chain of Lakes near Orlando south to the Florida Bay. J.A. 117, 170 ¶ 7. The basins, which the Eleventh Circuit declared "distinct," are but "artificial" and changeable lines drawn for water management purposes. See J.A. 68, 96-97. Not only are the basin lines dynamic, so are the flow regimes used to determine the interaction of waters between them. See *supra*, Statement Part C. The levees, S-9 pump and other structures merely control the rate and movement of water within the system. J.A. 171 ¶¶ 11-13.

The C&SF system is designed to maintain the close relationship between its integrated parts. For example, it continually returns seepage from the WCA-3 back to the WCA-3 for water supply, flood protection, and the prevention of salt water intrusion. J.A. 37, 172 ¶ 14. It sends to the WCA-3 flood waters that, but for the levees, would naturally have supplied the Everglades with water. And it maintains WCA-3 water at levels necessary to prevent salt water intrusion into the aquifer at the coast, reflecting the fact that the groundwater is undivided by any levee or other structure. The cycling of these waters is critical not only for

urban and agricultural areas, but for health of the entire Everglades system. See J.A. 65-66.

The Florida and federal legislatures recognized the integrated nature of the water system when they directed the development of the Comprehensive Everglades Restoration Plan, which treats all of the basins within the C&SF Project as critical to the South Florida Ecosystem. WRDA 1996 § 528(b)(1)(A)(i) (comprehensive plan to "provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades"); WRDA 2000, P.L. 106-541 § 601(a)(5) & (h)(1) ("The overarching objective of [CERP] is the restoration, preservation, and protection of the South Florida Ecosystem," broadly defined to include the Everglades and contiguous near-shore coastal water of South Florida). The Florida legislature similarly recognizes the need for restoration of the "Everglades ecosystem" to be comprehensive. Fla. Stat. § 373.4592(d).

In response to this Court's call for the views of the Solicitor General, the United States pointed out (at 13-14) the Eleventh Circuit's error:

> In the United States' view, the lower courts' characterization of the water control facilities, which presents a mixed question of law and fact, may well be incorrect. The C-11 Canal and WCA-3A can appropriately be viewed, for purposes of Section 402 of the Clean Water Act, as parts of a single body of water. The characterization is appropriate because the C-11 Basin, the C-11 Canal, and WCA-3A share a unique, intimately related, hydrological association. Furthermore, those components were created and are managed pursuant to legislative direction—by both the United States and the State of Florida—as a part of a single integrated resource.

Because the record on this question is clear and uncontested, and because the natural system, as well as the



regulatory and legislative treatment of the entire area of the C-11 Basin and WCA-3, establishes as a matter of law that it is a unitary water and ecosystem, this Court may reverse on this ground without the need for remand.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## ADDENDUM

### A. Pertinent Provisions of the Clean Water Act

**Section 101, 33 U.S.C. § 1251. Congressional declaration of goals and policy**

(a) **Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.** The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.] –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

* * *

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

* * *

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act [33 USCS §§ 1251 et seq.] to be met through the control of both point and nonpoint sources of pollution.

(b) **Congressional recognition, preservation, and protection of primary responsibilities and rights of States.** It is the policy of the Congress to recognize,

preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, .... It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(g) **Authority of States over water.** It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act [33 USCS §§ 1251 et seq.]. It is the further policy of Congress that nothing in this Act [33 USCS §§ 1251 et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

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**Section 208, 33 U.S.C. § 1288. Areawide waste treatment management**

(a) **Identification and designation of areas having substantial water quality control problems.** For the purpose of encouraging and facilitating the development and implementation of areawide waste treatment management plans –



* * *

(2) The Governor of each State, ... shall identify each area within the State which, as a result of urban-industrial concentrations or other factors, has substantial water quality control problems.... the Governor shall designate (A) the boundaries of each such area and (B) a single representative organization, including elected officials from local governments or their designees, capable of developing effective areawide waste treatment management plans for such area.

* * *

(b) **Planning process.** (1)(A) Not later than one year after the date of designation of any organization under subsection (a) of this section such organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 201 of this Act [33 USCS § 1281]. Plans prepared in accordance with this process shall contain alternatives for waste treatment management, and be applicable to all wastes generated within the area involved. The initial plan prepared in accordance with such process shall be certified by the Governor and submitted to the Administrator not later than two years after the planning process is in operation.

* * *

(2) Any plan prepared under such process shall include, but not be limited to –

(A) the identification of treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a twenty-year period, annually updated (including an analysis of alternative

waste treatment systems), including any requirements for the acquisition of land for treatment purposes; the necessary waste water collection and urban storm water runoff systems; and a program to provide the necessary financial arrangements for the development of such treatment works, and an identification of open space and recreation opportunities that can be expected to result from improved water quality, including consideration of potential use of lands associated with treatment works and increased access to water-based recreation;

(B) the establishment of construction priorities for such treatment works and time schedules for the initiation and completion of all treatment works;

(C) the establishment of a regulatory program to –

(i) implement the waste treatment management requirements of section 201(c) [33 USCS § 1281(c)],

(ii) regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area, and

(iii) assure that any industrial or commercial waste discharge into any treatment works in such area meet applicable pretreatment requirements;

(D) the identification of those agencies necessary to construct, operate, and maintain all facilities required by the plan and otherwise to carry out the plan;

(E) the identification of the measures necessary to carry out the plan (including financing), the period of time necessary to carry out the plan, the costs of carrying out the plan within such time, and the economic, social and



environmental impact of carrying out the plan within such time;

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(G) a process to (i) identify, if appropriate, mine-related sources of pollution including new, current, and abandoned surface and underground mine runoff, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(H) a process to (i) identify construction activity related sources of pollution, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(I) a process to (i) identify, if appropriate, salt water intrusion into rivers, lakes, and estuaries resulting from reduction of fresh water flow from any cause, including irrigation, obstruction, ground water extraction, and diversion, and (ii) set forth procedures and methods to control such intrusion to the extent feasible where such procedures and methods are otherwise a part of the waste treatment management plan;

(J) a process to control the disposition of all residual waste generated in such area which could affect water quality; and

(K) a process to control the disposal of pollutants on land or in subsurface excavation within such area to protect ground and surface water quality.

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**Section 301, 33 U.S.C. § 1311. Effluent limitations**

(a) **Illegality of pollutant discharges except in compliance with law.** Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) **Timetable for achievement of objectives.** In order to carry out the objectives of this Act there shall be achieved –

(1)(A) ... effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act [33 USCS §1314(b)], ...

* * *

(2)(A) for pollutants identified ... effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined



in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2)], which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315 [33 USCS § 1325]), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act [33 USCS § 1314(b)(2) ...

* * *

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

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**Section 302, 33 U.S.C. § 1312. Water quality related effluent limitations**

(a) **Establishment.** Whenever, in the judgment of the Administrator or as identified under section 304(1) [33 USCS § 1314(1)], discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) of this Act [33 USCS § 1311(b)(2)], would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure

protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

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**Section 303, 33 U.S.C. § 1313. Water quality standards and implementation plans**

* * *

(c) **Review; revised standards; publication.** (1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act [33



USCS §§ 1251 et seq.]. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

* * *

(d) **Identification of areas with insufficient controls; maximum daily loads; certain effluvient limitations revision.** (1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B), [33 USCS § 1311 (b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

* * *

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculations. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonable variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

* * *

(e) **Continuing planning process.** (1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.]

* * *

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section:

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;



(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 301 and 302 [33 USCS §§ 1311, 1312].

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**Section 304, 33 U.S.C. § 1314. Information and guidelines**

* * *

(f) **Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution.** The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 208 of this Act [33 USCS § 1288], within one year after the effective date of this subsection [effective Oct. 18, 1972] (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from –

* * *

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

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**Section 319, 33 U.S.C. § 1329. Nonpoint source management programs**

(a) **State assessment reports.** (1) Contents. The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which –

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this Act [33 USCS §§ 1251 et seq.];

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which had significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under



subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsection (h) and (i).

* * *

(b) **State management programs.** (1) In general. The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first four fiscal years beginning after the date of submission of such management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

(2) Specific contents. Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under paragraph (1)(B), taking into account the impact of the practice on ground water quality.

(B) An identification of programs (including, as appropriate, nonregulatory or regulatory programs for

enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A).

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**Section 402, 33 U.S.C. § 1342. National pollutant discharge elimination system**

(a) **Permits for discharge of pollutants.** (1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

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**Section 502, 33 U.S.C. § 1362. Definitions**

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

* * *



(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .

* * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

* * *

---

### B. Pertinent Provisions of Water Resources Development Act of 1996; P.L. 104-303

**SEC. 528. EVERGLADES AND SOUTH FLORIDA ECOSYSTEM RESTORATION.**

(a) DEFINITIONS. – In this section, the following definitions apply:

* * *

(4) SOUTH FLORIDA ECOSYSTEM. – The term "South Florida ecosystem" means the area consisting of the lands and waters within the boundary of the South Florida Water Management District, including the Everglades, the Florida Keys, and the contiguous near-shore coastal waters of South Florida.

* * *

(b) RESTORATION ACTIVITIES. –

(1) COMPREHENSIVE PLAN. –

(A) DEVELOPMENT. –



(i) PURPOSE. – The Secretary shall develop, as expeditiously as practicable, a proposed comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem. The comprehensive plan shall provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades. The comprehensive plan shall include such features as are necessary to provide for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives served by the Central and Southern Florida Project.

* * *

(4) GENERAL PROVISIONS. –

(A) WATER QUALITY. – In carrying out activities described in this subsection and sections 315 and 316, the Secretary –

(i) shall take into account the protection of water quality by considering applicable State water quality standards; and

(ii) may include in projects such features as are necessary to provide water to restore, preserve, and protect the South Florida ecosystem.

* * *

(c) INTEGRATION OF OTHER ACTIVITIES. –

(1) IN GENERAL. – In carrying out activities described in subsection (b), the Secretary shall integrate such activities with ongoing Federal and State projects and activities, including –

(A) the project for the ecosystem restoration of the Kissimmee River, Florida . . .

(B) the project for modifications to improve water deliveries into Everglades National Park authorized by section 104 of the Everglades National Park Protection and Expansion Act of 1989 (16 U.S.C. 410r-8);

(C) activities under the Florida Keys National Marine Sanctuary and Protection Act (16 U.S.C. 1433 note; 104 Stat. 3089); and

(D) the Everglades Construction Project of the State of Florida.

* * *

---

## C. Pertinent Provisions of Water Resources Development Act of 2000; P.L. 106-541

**SEC. 601. COMPREHENSIVE EVERGLADES RESTORATION PLAN.**

(a) DEFINITIONS. – In this section, the following definitions apply:

* * *

(5) SOUTH FLORIDA ECOSYSTEM. –

(A) IN GENERAL. – The term "South Florida ecosystem" means the area consisting of the land and water within the boundary of the South Florida Water Management District in effect on July 1, 1999.

(B) INCLUSIONS. – The term "South Florida ecosystem" includes –

(i) the Everglades;



(ii) the Florida Keys; and

(iii) the contiguous near-shore coastal water of South Florida.

* * *

(b) COMPREHENSIVE EVERGLADES RESTORATION PLAN. –

(1) APPROVAL. –

(A) IN GENERAL – Except as modified by this section, the Plan is approved as a framework for modifications and operational changes to the Central and Southern Florida Project that are needed to restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. The Plan shall be implemented to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem and to achieve and maintain the benefits to the natural system and human environment described in the Plan, and required pursuant to this section, for as long as the project is authorized.

* * *

(h) ASSURANCE OF PROJECT BENEFITS. –

(1) IN GENERAL. – The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection.

* * *

---

Supreme Court, U.S.
FILED
NOV 14 2003

No. 02-626

IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

*v.*

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA and FRIENDS OF THE EVERGLADES, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF FOR RESPONDENT MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

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## QUESTION PRESENTED

Petitioner pumps pollutants, contained in a drainage canal which is a jurisdictional water of the United States, from a point source consisting of pumps and pipes, against natural flow, into other waters of the United States (the "Everglades Protection Area"), where the pollutants would not be added to the receiving waters without the affirmative action of the instrumentality of the pumps and pipes.

The question is whether the operation of this point source constitutes the "addition" of a pollutant within the meaning of "discharge" in the Clean Water Act.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | vi |
| Table of Appendices | xiv |
| Statement | 1 |
| A. The Regulatory Structure Of The Clean Water Act | 1 |
| 1. The Cooperative Federalism Of The NPDES Permit System | 2 |
| 2. The CWA Requires An NPDES Permit For Every Point Source Discharge Of A Pollutant (The Applicable Definitions) | 3 |
| 3. The CWA's Interdependent Regulation Of "Point Sources" And "Nonpoint Sources" | 5 |
| B. The Facts Of This Case | 6 |
| 1. The Everglades Protection Area | 6 |
| 2. The Polluted C-11 Drainage Canal | 7 |




*Contents*


| | Page |
|---|---|
| 3. Petitioner's S-9 Pump Station Discharges High Quantities Of Canal Waters Containing Pollutants Into The Everglades Protection Area, Against The Natural Flow | 8 |
| 4. The Devastating Impact of the Discharge of Pollutants on the Everglades Protection Area | 8 |
| C. The Federal Efforts To Restore The Everglades | 9 |
| D. The Proceedings Below | 11 |
| Summary of Argument | 12 |
| Argument | 14 |
| I. Petitioner's Backpumping Of Pollutants From The C-11 Canal Into The Everglades Protection Area Requires A Permit Under The Clean Water Act | 14 |
| A. The Plain Language Of The CWA Dictates The Lower Courts' Conclusion That Petitioner's Discharges From The S-9 Pump Station Into The Higher Quality Surface Waters Of The Everglades Constitutes An Addition Of Pollutants That Requires A Permit | 14 |

*Contents*


*Page*

1. The Meaning of the Word "Addition" . 17

2. The Meaning Of the Word "From" .... 18

3. The Point Source ..... 19

B. The Lower Courts' Rulings Here Are Consistent With The Structure Of The CWA ..... 21

1. The Definition Of Point Source Expressly Excludes Certain Water Transfers But Not This One ..... 21

2. Other Provisions Of The CWA Make Clear That Point Sources Need Not Originate Or Produce Pollutants ..... 22

C. The Holdings Of Other Lower Courts Regarding The Meaning Of "Addition," Including The "Dam Cases," Are Consistent With The Eleventh Circuit's Decision ..... 24

II. The Petitioner And The Solicitor General Are Asking For Judicially Created Exemptions To The CWA ..... 26

A. Section 304(f) Does Not Exempt Petitioner From The NPDES Permit Requirements ..... 27




*Contents*


*Page*

B. The Solicitor General's "Singular Waters" Argument Is Inconsistent With The Plain Meaning Of The CWA ..... 30

C. Neither Sections 101(g), Nor § 202(2), Nor The "Traditional Powers Of The States" Exempt Petitioner From The NPDES Permit Requirements. ..... 33

D. The Rule Of Lenity Has No Application Here ..... 37

III. Requiring An Npdes Permit For The S-9 Structure Promotes Federalism And Does Not Create An Undue Burden Upon Water Supply Districts Or Everglades Restoration ..... 38

A. The CWA's Permit Requirements in This Case Are Consistent with Principles of Federalism and Do Not Interfere with "Traditional Powers" of the States .... 38

B. The CWA's Permit Requirements In This Case Do Not Impose An Undue Burden Upon Water Supply Districts Or Upon The Everglades Restoration Project ... 40

Conclusion ..... 45

## TABLE OF CITED AUTHORITIES


Page

**Cases:**

*Alabama Rivers Alliance v. F.E.R.C.*, 325 F.3d 290 (D.C. Cir. 2003) ..... 25

*Amigos Bravos v. EPA*, 324 F.3d 1166 (10th Cir. 2003) ..... 19

*Arkansas v. Oklahoma*, 503 U.S. 91 (1992) ..... 2, 3

*Avoyeless Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) ..... 32

*Barnhart v. Sigmon Coal Company, Inc.*, 534 U.S. 438 (2002) ..... 14, 21

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... 20, 24-25, 42

*Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1986) ..... 27

*City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981) ..... 13, 15, 18, 19

*Committee to Save Mokelumme River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993) ..... 25





Page

*Crandon v. United States*, 494 U.S. 152 (1990) ... 37

*Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) ..... 25

*Deaton v. United States*, 209 F.3d 331 (4th Cir. 2000) ..... 32

*Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) ..... 25, 31

*EPA v. California ex rel. State Water Resorces Control Board*, 426 U.S. 200 (1976) ..... 1, 2, 3, 37

*Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) ..... 19

*International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ..... 2, 39

*League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) ..... 5

*Miccosukee Tribe v. SFWMD*, No. CIV 98-6056, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999) .. 11

*Miccosukee Tribe v. United States*, No. CIV 95-0533, 1998 WL 1805539 (S.D. Fla. Sept. 14, 1998) ... 6

*Cited Authorities*


*Page*

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... 26, 41

*National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) ..... 26, 41

*Natural Resources Defense Counsel v. EPA*, 966 F.2d 1292 (9th Cir. 1992) ..... 22

*Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155 (9th Cir. 2003) ..... 16, 25, 36

*Owasso Indepependent School District v. Falvo*, 534 U.S. 426 (2002) ..... 21

*Perrin v. United States*, 444 U.S. 37 (1979) ..... 17

*Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) ..... 20-21

*PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) .. *passim*

*Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) ... 14, 17

*Rybacheck v. EPA*, 904 F.2d 1276 (9th Cir. 1990) .. 32

*Sierra Club v. Abston Construction. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980) ..... 28




*Cited Authorities*


*Page*

*Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002) ..... 36

*Solid Waste Agency of Northern Cook County v. United States Army Corps Of Engineers*, 531 U.S. 159 (2001) ..... 32, 33, 35

*Train v. City of New York*, 420 U.S. 35 (1975) .... 2

*Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984) ..... 28

*United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) ..... 28, 29, 30

*United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985) ..... 32

*United States v. SFWMD*, 847 F. Supp. 1567 (S.D. Fla. 1992), *aff'd in part and rev'd in part*, 28 F.3d 1563 (11th Cir. 1994) ..... 9, 10

*United States v. Shabani*, 513 U.S. 10 (1994) ..... 38

*United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) ..... 37

*Page*

**Statutes:**

33 U.S.C. § 1251 ..... 1, 2, 34

33 U.S.C. § 1288 ..... 5

33 U.S.C. § 1311 ..... *passim*

33 U.S.C. § 1313 ..... 2, 5, 29, 36

33 U.S.C. § 1314 ..... 2, 5, 27

33 U.S.C. § 1319 ..... 3, 37

33 U.S.C. § 1329 ..... 5

33 U.S.C. § 1342 ..... *passim*

33 U.S.C. § 1362 ..... *passim*

Water Resources Development Act of 1996,
Pub. L. No. 104-303 § 528(b)(4)(B) ..... 11, 39

Water Resources Development Act of 2000,
Pub. L. No. 106-541, § 602(a), 114 Stat. 2693 .. 6

Water Resources Development Act of 2000,
§ 601(i)(3) ..... 11, 39

Water Resources Development Act of 2000,
§ 602(a)(1), (2) ..... 9



*Page*

Fla. Stat. § 373.116 ..... 20

Fla. Stat. § 373.118 ..... 20

Fla. Stat. § 373.243 ..... 20

Fla. Stat. § 373.4592 ..... 10

Fla. Stat. § 373.4592(4)(e) ..... 10

Fla. Stat. § 373.4592(4)(e)(2) ..... 36, 45

Fla. Stat. § 373.036(2)(d)(3) ..... 20

**Rules:**

40 C.F.R. § 122.2 (2002) ..... *passim*

40 C.F.R. § 122.4 (2002) ..... 3

40 C.F.R. § 122.23 (2002) ..... 5, 28

40 C.F.R. § 122.24 (2002) ..... 28

40 C.F.R. § 122.25 (2002) ..... 43

40 C.F.R. § 122.26 (2002) ..... 5, 23, 28

40 C.F.R. § 122.27 (2002) ..... 5, 28

| | Page |
|---|---|
| 40 C.F.R. § 122.28 (2002) | 43 |
| 40 C.F.R. § 122.44 (2002) | 39 |
| 40 C.F.R. part 131 (2002) | 2 |
| 118 Cong. Rec. 10,203, 10,251 (1972) | 39 |
| 118 Cong. Rec. 10,206 (1972) | 30 |
| **Other Authorities:** | |
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| Everglades Protection Area Tributary Basins Conceptual Plan for Achieving Long-Term Water Quality Goals Final Report, Executive Summary, dated April 17, 2003 | 10 |



| | Page |
|---|---|
| A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Committee on Public Works, 93rd Cong., 1st Sess. (1973) | 1-2 |
| 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, Serial No. 95-14 at 532 (Comm. Print 1978) | 34, 35 |
| William H. Rodgers, Jr., The Miccosukee Indians and Environmental Law: A Confederacy of Hope, 31 Envt'l. L. Rptr. 10918 (Aug. 2001) | 6-7 |
| 2 William H. Rodgers, Jr., Environmental Law: Air and Water § 4.10 at 148 (1986) | 19 |
| 2 William H. Rodgers, Jr., Environmental Law: Air and Water § 4.10 at 158 (1986) | 18 |
| 2 William H. Rodgers, Jr., Environmental Law: Air and Water § 4.22 at 324-30 (1986) | 29 |
| U.S. EPA NPDES Permit Writers' Manual, Chapter 2, p.10, Environmental Agency of Wastewater Mgt. | 22 |
| Webster's Third New International Dictionary Unabridged, 24 (1993) | 28 |

## TABLE OF APPENDICES


*Page*

Appendix A — SFWMD Map captioned, "Everglades Protection Area," available at www.dep.state.fl.us/evergladesforever/progress/map.htm (last visited 11/12/03) ..... 1a

Appendix B — SFWMD Brochure entitled "Everglades Program", Map captioned, "Everglades Protection Area & Surrounding Areas" ..... 2a

Appendix C — SFWMD Map captioned, "Figure ES-1. Overview of the Everglades Protection Area and Tributary Basins", Burns & McDonnell, Final Report: Everglades Protection Area Tributary Basins, Conceptual Plan for Achieving Long-Term Water Quality Goals, Executive Summary, dated March 17, 2003, at ES-3, available at http://exchange.law.miami.edu/everglades/restore/FinalConceptual/finalconceptual_031703%20(3.43mb).pdf (last visited 11/12/03) ..... 3a

Appendix D — SFWMD 2002 Everglades Consolidated Report, Executive Summary, Chapter 8A, chart captioned, "Achieving Everglades Water Quality, Everglades Forever Act Timelines", at 24, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03) ..... 4a




*Appendices*


*Page*

Appendix E — SFWMD 2003 Everglades Consolidated Report, Executive Summary, Chapter 8A, chart captioned, "Achieving Everglades Water Quality, Mandated Time Frames," at 26, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03) ..... 5a

Appendix F — SFWMD 2002 Everglades Consolidated Report, Executive Summary, Chapter 8B, photograph of western Broward County, Florida, at 25, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03) ... 6a

Appendix G — SFWMD 2003 Everglades Consolidated Report, Executive Summary, Chapter 8B, photograph of western Broward County, Florida, at 28, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03) ... 7a

## STATEMENT

The Clean Water Act ("CWA")[1] prohibits the "discharge of any pollutant" without a permit. 33 U.S.C. §§ 1311, 1342. The South Florida Water Management District ("Petitioner") operates the S-9 pump station, which discharges massive quantities of pollutants, withdrawn from a drainage canal, into the pristine waters of the Everglades Protection Area without a permit. The Miccosukee Tribe of Indians of Florida ("Tribe") and Friends of the Everglades sued under the CWA to require the Petitioner to obtain a permit. The Petitioner argued below that the S-9 pump station does not require a permit because the pollutants it discharges are not produced by the S-9 itself but instead are withdrawn from the already polluted drainage canal. The lower courts correctly held that Petitioner's argument is contrary to the plain language, and would defeat the express purpose, of the CWA.

### A. The Regulatory Structure Of The Clean Water Act

The CWA was a major transformation in the nation's approach to water pollution. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 201-09 (1976). The Act was "prompted by the conclusion of the Senate Committee on Public Works that 'the Federal water pollution control program has . . . been inadequate in every vital aspect,'" *id.* at 203, and a federally-controlled permit system based on effluent limitations was regarded as the remedy. *A Legislative History of the Water Pollution Control Act*

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1. *See* Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq*.

*Amendments of 1972*, Committee on Public Works, 93rd Cong., 1st Sess. (1973), ("2 *Leg. Hist.*") at 1426.

### 1. *The Cooperative Federalism Of The NPDES Permit System*

The CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). The CWA establishes "a comprehensive program for controlling and abating water pollution," *Train v. City of New York*, 420 U.S. 35, 37 (1975), and declares the "national goal that the discharge of pollutants into the navigable waters be eliminated. . . ." 33 U.S.C. § 1251(a)(1).

The statute provides two sets of water quality controls. *See Arkansas*, 503 U.S. at 101. "'Effluent limitations' are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Id.* (quoting §§ 1311 & 1314). "Water quality standards" are promulgated by the states with substantial guidance by the EPA, and "establish the desired condition of a waterway." *Id.*; 33 U.S.C. § 1313; 40 C.F.R. part 131 (2002).

"The primary means for enforcing these limitations and standards" is the National Pollutant Discharge Elimination System ("NPDES"). *Arkansas*, 503 U.S. at 101; *California*, 426 U.S. at 205; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). "An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations



(including a timetable for compliance) of the individual discharger. . . ." *California*, 426 U.S. at 205 (citing 33 U.S.C. § 1319). NPDES permits allow polluters, who obtain a permit, to discharge a specified amount of the pollutant at levels below thresholds incorporated into the permits. *See* 33 U.S.C. § 1342. The permits are designed to allow the lowest level of discharge technologically feasible. *See* 33 U.S.C. § 1311(b)(1)(A)-(C); *see also* 40 C.F.R. § 122.4(a), (d) (permits must ensure compliance with water quality requirements).

The EPA has the authority in the first instance to issue NPDES permits. *See* 33 U.S.C. § 1342(a)(1). However, consonant with its policy to recognize, preserve and protect the primary responsibilities and rights of States, to prevent, reduce and eliminate pollution, Congress provided that each State may establish and administer its own permit program if the program conforms to federal guidelines and is approved by the Administrator of the EPA. *See* 33 U.S.C. § 1342(b); *Arkansas*, 503 U.S. at 102. The EPA retains the authority to review the operation of a State's permit program, and each permit issued by a State is subject to EPA review for conformity with the guidelines and requirements of the CWA. *See California*, 426 U.S. at 208 (citing 33 U.S.C. §§ 1342(d)(1), (2) & (3)).

### 2. *The CWA Requires An NPDES Permit For Every Point Source Discharge Of A Pollutant (The Applicable Definitions)*

Congress clearly defined what sources of pollution would be controlled under the NPDES program. The CWA prohibits the "discharge of any pollutant" without an NPDES permit. 33 U.S.C. §§ 1311, 1342. "Discharge of a pollutant" is

defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(a).[2] The EPA regulation further clarifies "discharge of a pollutant" as including additions of pollutants into waters of the United States from "surface runoff which is collected or channelled by man; [and] discharges through pipes, sewers or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works. . . ." 40 C.F.R. § 122.2.

"Pollutant" is defined very broadly to include "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2. It was conceded below that the water which the S-9 pump station discharges contains pollutants. J. App. at 154, ¶ 72; Pet. App. at 4a-5a, 29a; *see also* District's Brief in *Miccosukee Tribe v. SFWMD*, No. 00-15703, at 8. "Navigable waters" is defined as the "waters of the United States." 33 U.S.C. § 1362(7). It was undisputed below that the Everglades Protection Area, into which the pollutants are discharged, constitute navigable waters. *Id.*; Pet. App. at 5a.

The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which

2. The CWA does not define the words "addition" or "from."



pollutants are or may be discharged." 33 U.S.C. § 1362(14). The EPA regulation identifies pipes as classic examples of point sources. *See* 40 C.F.R. § 122.2. Petitioner admitted below that the S-9 pump station is a point source, *see* District Brief in *Miccosukee Tribe v. SFWMD*, No. 00-15703 at 8, and the Eleventh Circuit accepted that undisputed fact. Pet. App. at 4a-5a ("No party disputes that the S-9 pump station and, in particular, the pipes from which water is released constitute a point source. . . .").

### 3. *The CWA's Interdependent Regulation Of "Point Sources" And "Nonpoint Sources"*

Point sources of pollutants include all "discrete conveyances" because they may be effectively regulated by a permit system. Accordingly, every point source discharge must have an NPDES permit. *See* 33 U.S.C. § 1342. Nonpoint sources are diffused sources of pollutants, not associated with a discrete conveyance, which are therefore more difficult to regulate through permits.[3] Nonpoint sources are generally regulated under state water quality management programs with EPA guidance. *See* 33 U.S.C. §§ 1313, 1329.

The CWA lists certain categories of activities which may cause nonpoint source pollution. *See, e.g.*, 33 U.S.C. §§ 1288, 1314(f), 1329. However, these activities are not excluded from point source regulation if they in fact involve discharges of pollutants from discrete conveyances. *See e.g.*, 40 C.F.R. §§ 122.2, 122.23, 122.26, 122.27. This is because under the CWA, regulatory controls of "point source" and

3. *See, e.g., League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002) (nonpoint sources are diffused sources not associated with a discrete conveyance).

"nonpoint source" pollutants work in concert to effectuate the CWA's ultimate goal of eliminating the discharge of pollutants into navigable waters of the United States.

## B. The Facts Of This Case

### 1. *The Everglades Protection Area*

"The Everglades is an extensive and unique wetlands system consisting of millions of acres of shallow sawgrass marshes, wet prairies, aquatic sloughs, and tree islands." *See Miccosukee Tribe v. United States*, No. CIV 95-0533, 1998 WL 1805539, at *2 (S.D. Fla. Sept. 14, 1998). The area provides a home for unique wildlife such as wading birds, and threatened and endangered species such as wood storks, snail kites, bald eagles, Florida panthers and American crocodiles. *Id.* Congress has identified the Everglades as an important environmental "treasure" that "includes uniquely-important and diverse wildlife resources and recreational opportunities." Water Resources Development Act of 2000 ("WRDA 2000"), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693.

The Everglades Protection Area includes WCA 3A and Everglades National Park, a 1.5 million acre International Biosphere Preserve, a World Heritage site, and a wetland of international significance that is home to numerous threatened and endangered species. *See* maps of area, Tribe's App. 1a-3a; J. App. at 147. It is also home to the Tribe.[4] *See generally* William H. Rodgers, Jr., The Miccosukee

4. The Tribe has a perpetual lease and rights to reside in, practice religious rites, and use most of WCA 3A, (where the S-9 discharges). J. App. at 157.



Indians and Environmental Law: A Confederacy of Hope, 31 Envt'l. L. Rptr. 10918 (Aug. 2001). The Everglades is an oligotrophic wetlands system that is phosphorus-limited and phosphorus-sensitive. Pet. App. at 16a; J. App. at 154. The level of phosphorus is the defining chemical characteristic of the Everglades system and the addition of phosphorus above natural levels causes an imbalance in flora and fauna. Pet. App. at 16a-17a; J. App. at 154-55.

### 2. *The Polluted C-11 Drainage Canal*

In the early 1900's, the Army Corps of Engineers began digging the C-11 drainage canal (the "C-11 Canal") to facilitate the draining of the western portion of Broward County, which is part of the C-11 Basin. Pet. App. at 3a. In the 1950's, the L-37 and L-33 levees were constructed to permanently separate the C-11 Basin and Canal from the Everglades Protection Area to the West. Pet. App. at 3a. The C-11 Canal and the Everglades Protection Area are thus separate bodies of United States waters. Pet. App. at 28a.

The C-11 Canal collects polluted stormwater runoff from urban, suburban, residential, commercial and agricultural nonpoint sources in the C-11 Basin. J. App. at 114-15, 168-69, 172 ¶ 18. As a result, the water in the C-11 Canal contains high levels of pollutants, such as phosphorus, and is of much lower quality than the waters in the Everglades Protection Area, where it is discharged. *Id.* at 114-15, 168-69.[5]

5. *http://www.epa.gov/region4/water/tmdl/florida/index.htm*, pp. 1-6, 113, 148 (the South New River Canal (WID # 3277A) – known as C-11– is impaired as to nutrients, coliforms and dissolved oxygen).

### 3. *Petitioner's S-9 Pump Station Discharges High Quantities Of Canal Waters Containing Pollutants Into The Everglades Protection Area, Against The Natural Flow*

The S-9 pump station is comprised of three massive transmission pipes powered by huge diesel engines, J. App. at 153; Strowd Dep. at 52, 81, that lift polluted water from the C-11 Canal and discharge it, against its natural flow, into the pristine Everglades Protection Area, at the rate of 960 cubic feet per second per pipe. P. App. at 7a-8a, 17a n.5; *see also* Strowd Dep. at 50-51. The structure is owned, operated, controlled and maintained by Petitioner and connects the C-11 Canal to the L-33 and L-37 Levees. J. App. at 147; Pet. App. at 3a.

Petitioner has installed this point-source discharge facility at a far west upstream point in the C-11 Canal and has operated this structure in a way that totally disrupts the normal eastward flow of the canal. Instead of allowing the canal water to naturally move towards the east, the S-9 pump station reverses the natural flow, backpumps "against a gradient" or "against what would flow naturally the other direction, or another direction," and disposes the polluted water to the west, where it would not have flowed otherwise. Pet. App. at 7a-8a; J. App. at 67, 150, 161. It is undisputed that the water discharged from the S-9 point source contains "pollutants." Pet. App. at 4a-5a.

### 4. *The Devastating Impact of the Discharge of Pollutants on the Everglades Protection Area*

The discharge of pollutants from the S-9 point source has a severe adverse impact not only on the water quality but also on the flora and fauna of the Everglades. Pet. App.



at 16a-17a; J. App. at 167-68. The Tribe's expert, Dr. Ron Jones, also a leading United States government expert witness in the landmark Everglades case,[6] J. App. at 164, 165 ¶ 9, concluded that severe harm is being done to the receiving waters from the S-9 pump station and that the destruction caused by excess phosphorus in the Everglades is irreversible. J. App. at 154-56, 167-68. The backpumping from the S-9 pump station adds phosphorus at high levels to the phosphorus sensitive Everglades system. *Id.* As a result of the excess pollutants, the areas immediately surrounding the S-9 pump station are highly degraded. *Id.* Furthermore, Petitioner's massive backpumping greatly increases the velocity of the water, causes a resuspending of sediments off the bottom of the C-11 Canal, and integrates these sediments, which include phosphorus, heavy metals, pesticides and herbicides, into the water discharged into the Everglades Protection Area. J. App. at 124-25, 163; Jones Dep. at 73-78; *see also* Bechtel Dep. at 87 (pesticides have been detected at the S-9).

## C. The Federal Efforts To Restore The Everglades

Because the Everglades is a national "treasure" which is "critical to the regional economy," there is a strong federal interest in its preservation. WRDA 2000, § 602(a)(1), (2). In 1988, the United States sued the Petitioner alleging that it allowed farm runoff waters, polluted with phosphorus, to be released into the Everglades thereby damaging and endangering the native plant and animal life of that wetlands system. *See United States v. South Fla. Water Mgmt. Dist.* ("*SFWMD II*"), 847 F. Supp. 1567, 1569 (S. D. Fla. 1992). The suit resulted in a 1992 Consent Decree which established

6. *See United States v. SFWMD*, 847 F. Supp. 1567 (S.D. Fla. 1992), *aff'd in part and rev'd in part*, 28 F.3d 1563 (11th Cir. 1994).

an "ambitious strategy to restore and preserve the Everglades ecosystem." *SFWMD II*, 847 F. Supp. at 1569. The Decree established "interim and long-term phosphorus concentration limits for the [Everglades] and delineates specific remedial programs designed to achieve these limits." *Id.* On April 27, 2001, the Consent Decree was modified to incorporate the Florida Everglades Forever Act of 1994 (the "EFA"), Fla. Stat. § 373.4592, which amended certain compliance deadlines regarding phosphorus reductions and required discharges to meet water quality standards by 2006. *See SFWMD II*, No. 88-1886-CIV-Hoeveler, D.E. 1623 (Omnibus Order dated April 27, 2001). Recent legislation in 2003 enacted "moderating provisions" authorizing discharges which do not meet water quality standards until 2016. Fla. Stat. § 373.4592(4)(e).[7] Moreover, this same 2003 legislation adopted a plan which does not contemplate full completion of water quality goals for the C-11 Basin until 2036.[8]

The Comprehensive Everglades Restoration Plan ("CERP"), was adopted in WRDA 2000 when Congress authorized Everglades restoration. WRDA 2000 is specifically premised upon the State achieving water quality standards as a pre-CERP condition. No provisions of WRDA 2000 changed this assumption or exempted the State from meeting water quality standards in advance of, and separate

7. *See also* Everglades Protection Area Tributary Basins Conceptual Plan for Achieving Long-Term Water Quality Goals Final Report, Executive Summary, dated April 17, 2003 at ES-9.

8. *See* Burns & McDonell, Final Report: Everglades Protection Area Tributary Basins Long Term Plan For Achieving Water Quality Goals ("Long Term Plan") available at *http://www.sfwmd.gov /org/erd/bsfboard/waterquality.pdf* at 6-86 (last visited Nov. 7, 2003).



from, CERP. (Restudy at H-F-17). Plans involving Everglades restoration recognize that the Everglades need protection and provide directives on water quality issues. These plans do not substitute for the point source permitting structure of the CWA. Indeed, they expressly require compliance with any applicable federal law. *See* WRDA 2000 § 601(i)(3); WRDA 1996 § 528(b)(4)(B).

**D. The Proceedings Below**

The trial court granted summary judgment in favor of the Tribe, finding that "undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, the latter being a separate body of United States water with a different level of water quality."[9] The trial court found that it was not necessary that the S-9 pump station be the originator of the transferred pollutants because "there is no doubt in this case, and it is uncontested by the parties, that S-9 is discharging pollutants into the Everglades. That the pollutants are not formed solely by S-9 is immaterial in a plain reading of the Act." Pet. App. at 29a.

On appeal the Eleventh Circuit explained that "[t]he parties mainly dispute one legal issue: whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source." Pet. App. at 5a. In upholding the grant of summary judgment by the trial court, the Eleventh Circuit concluded that an addition from a point source occurred because the point source was the cause-in-fact of the release of pollutants into navigable waters. *Id.* at 8a and 8a n.8. The Eleventh Circuit agreed

9. The Petitioner's Appendix at 28a misquotes this portion of the trial court's order. *See Miccosukee Tribe v. SFWMD*, No. CIV 98-6056, 1999 WL 33494862, at *6 (S.D. Fla. Sept. 30, 1999).

with the trial court that for there to be an addition under the CWA's definition of discharge of pollutants, the S-9 pump station did not have to be the originating source of the pollutants. Pet. App. at 7a n.6.

## SUMMARY OF ARGUMENT

1. The plain and unambiguous language of the CWA prohibits the "discharge of any pollutant" without an NPDES permit, and expressly defines such discharges as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311, 1342, and 1362(12)(A). Because the Petitioner backpumps pollutants in water from the C-11 Canal into the Everglades Protection Area, the plain meaning of the clear text of the CWA requires that Petitioner obtain an NPDES permit. The S-9 pump station is admitted to be a "point source;" the pumped water is acknowledged to contain "pollutants;" and there is no dispute that the Everglades Protection Area are navigable waters. Backpumping pollutants into the Everglades Protection Area which would not otherwise appear there, is an "addition" under any common, or technical, meaning of the word. That is all this Court need consider to resolve this case. If more were needed than the plain meaning of the text, the express Congressional purpose of the CWA as stated in the statute, as reflected in its structure, and as articulated by this Court, mandates this construction of the text.

2. Petitioner and the Solicitor General essentially are requesting this Court to create nonstatutory exemptions to the CWA that are contrary to the plain meaning of its text, its purpose, its legislative history, and prior construction by the EPA and the Solicitor General himself. The Petitioner would have this Court rewrite the text of the CWA to provide that



an NPDES permit is required for "any addition of any pollutant to navigable waters from any point source, *unless the pollutant is not produced by the point source itself.*" But the text contains no such condition, and creating it would defeat the legislative purpose to "establish an all-encompassing program of water pollution regulation" in which "[*e*]*very* point source discharge is prohibited unless covered by a permit. . . ." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981) (footnote omitted) (emphasis in original). Similarly, the Solicitor General suggests the Court rewrite the operative language of the CWA to state a permit must be obtained for "any addition of any pollutant to navigable waters from any point source, *unless the pollutant originates from some already-polluted navigable water.*" Under the Solicitor General's absurd suggestion, all of the waters of the United States could be polluted from a single source of polluted water so long as that point source did no more than "convey" the polluted water from a polluted navigable source. It is difficult to imagine a rewriting of the text more at odds with the statutory purpose of controlling and ultimately eliminating all point source pollution.

3. The remaining arguments are red herrings. Section 304(f) of the CWA provides no exemption for pollutants when they are directed from nonpoint sources to a point source. The control of pollution through NPDES permits does not interfere with traditional State authority over water allocation. And finally the NPDES permitting system facilitates the partnership between the federal government and the States embodied in "our federalism," prevents inter-state disputes over water-pollution control, protects downstream States and Tribes, and imposes no burden on water management districts or the restoration of the Everglades.

## ARGUMENT

### I. PETITIONER'S BACKPUMPING OF POLLUTANTS FROM THE C-11 CANAL INTO THE EVERGLADES PROTECTION AREA REQUIRES A PERMIT UNDER THE CLEAN WATER ACT

Statutory construction "begin[s] with the language of the statute." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "The inquiry ceases 'if the statutory language is unambiguous' and 'the statutory scheme is coherent and consistent.'" *Barnhart*, 534 U.S. at 450 (internal citations omitted). The text and structure of the CWA support the lower courts' conclusion that the S-9 pump station is a classic point source, featuring "pipes" and "conduits," that requires a permit before it may discharge pollutants into the Everglades Protection Area.

#### A. The Plain Language Of The CWA Dictates The Lower Courts' Conclusion That Petitioner's Discharges From The S-9 Pump Station Into The Higher Quality Surface Waters Of The Everglades Constitutes An Addition Of Pollutants That Requires A Permit

The plain language of the CWA prohibits the "discharge of any pollutant" without an NPDES permit. 33 U.S.C. §§ 1311, 1342. The "discharge of a pollutant" is expressly defined as "any addition of any pollutant to navigable waters



from any point source." 33 U.S.C. § 1362(12)(A). As this Court has held, the manifest intent of the CWA is:

> clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.

*City of Milwaukee*, 451 U.S. at 318 (emphasis in original).

In this case, there is no dispute that: 1) the S-9 pump station is a "point source;" 2) that the water discharged from the S-9 pump station contains "pollutants;" and 3) the WCA 3A (which is part of the Everglades Protection Area) constitutes "navigable waters." Pet. App. at 4a-5a; *see also* J. App. at 201. It is clear that the pumping of water containing pollutants from the S-9 into the Everglades Protection Area constitutes the "discharge" of pollutants because it adds pollutants to that body of water from a point source.

If this were not clear enough, the EPA regulatory definition of "discharge of a pollutant:"

> includes additions of pollutants into waters of the United States from: Surface runoff which is collected or channelled by man: [and] discharges through pipes . . . or other conveyances owned by a State . . . which do not lead to a treatment works . . . .

40 C.F.R. § 122.2. This regulation is directly applicable because the C-11 Canal collects and channels runoff from

the C-11 Basin that is discharged through the pipes in the Petitioner's S-9 pump station.

The Petitioner relies on undefined terms in the definition of the term "discharge of a pollutant" to argue that the discharge of pollutants from the S-9 pump station does not constitute an "addition" of pollutants to navigable waters "from" a point source. *See, e.g.*, P. B. at 19, 20. Petitioner argues that the S-9 discharges do not require permitting because the pollutants are not produced by the S-9 but instead are conveyed from the polluted C-11 Canal water. The Petitioner's construction would require the Court to add language to the statutory definition as follows: "any addition of any pollutant to navigable waters from any point source *unless the pollutant is not produced by the point source itself*."[10] The Solicitor General would rewrite the statutory definition as follows: "any addition of any pollutant to navigable waters from any point source *unless the pollutant originates in some already polluted navigable waters*". The exceptions the Petitioner and the Solicitor General would have this Court read into the CWA are contrary to its plain language and its fundamental purpose of eliminating the discharge of pollutants into navigable waters.

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10. This novel interpretation of the CWA is contrary to the position taken by the EPA in *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003), *cert. denied*, No. 03-257, 2003 WL 21990009 (Oct. 20, 2003). In this recently decided case, the EPA rejected the state's attempt to exempt discharges of unaltered ground water from NPDES regulation. Instead, EPA took the position that discharges of ground water into surface waters were subject to NPDES permitting requirements *even though the operators of the mines were not responsible for the presence of the pollutants in the ground water*. *Id.* at 1158-59 (emphasis added).



### 1. *The Meaning of the Word "Addition"*

Because Petitioner conceded below that the S-9 pump station was a point source, and because point sources are regulated by permits if they add pollutants to navigable waters, Petitioner is forced to invent an interpretation of the undefined term "addition" as used in the definition of the "discharge of a pollutant." However, under any reasonable interpretation of the term "addition," Petitioner "added" pollutants to the receiving waters. If not otherwise defined, words in a statute "will be interpreted, as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The plain meaning of "addition," is "the joining or uniting" of one thing to another." Webster's Third New International Dictionary Unabridged, at 24 (1993). To "add" means to increase in number of size. *Id.* The discharge from the S-9 pump station "adds" pollutants to the Everglades Protection Area and does so at levels greatly exceeding those of the receiving waters. Indeed, without the S-9 pumps and pipes, the pollutants in the C-11 Canal would not be added to the Everglades Protection Area.

The word "addition" must also be construed in its context as part of the definition of the term "discharge of a pollutant." *See Robinson*, 519 U.S. at 342. The plain meaning of "discharge" "is to give outlet to, pour forth, emit. . . ." *See also PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 725 (1994), J. Thomas dissenting, citing Webster's Ninth New Collegiate Dictionary 360 (1991) (describing discharge as a "flowing or issuing out" or "something that is emitted"). Taken in this context, the pumping of polluted waters from the C-11 Canal and subsequent release from the S-9 pump station into protected wetlands is a pouring forth and therefore, a "discharge" or "addition" of pollutants. The fact that Petitioner may not alter

the pollutant before discharging it is irrelevant because Petitioner's intentional backpumping of water containing pollutants at levels greatly exceeding the natural level of the receiving waters, J. App. at 154-56, is "adding" pollutants into waters that would not otherwise receive them.

### 2. *The Meaning Of the Word "From"*

The word "from" is also not defined in the CWA but, as the Eleventh Circuit explained, the natural reading of "from" "indicate[s] the 'agent or instrumentality' or the 'cause or reason' by which the pollutants are added to navigable waters." Pet. App. at 7a n.6, citing Random House Dictionary of the English Language at 770, (2d ed. 1987). *See also* 2 William H. Rodgers, Jr., Environmental Law: Air and Water § 4.10 at 158 (1986) ("The statutory condition that a pollutant be 'added' to the stream is met if the source is the cause of the appearance of the pollutant regardless of the mechanism"). In other words, "from" refers to the discernible structure, the point, by which the pollutants are added. There is no question the pollutants were added from the S-9 pump station.

Petitioner argues that "from" indicates that the point source itself must originate or produce the pollutants. This argument is directly contrary to the text of the CWA, which defines "point source" as "any discernible, confined and discrete *conveyance*, including but not limited to any pipe . . . from which pollutants are discharged." 33 U.S.C. § 1362(14) (emphasis added). A point source is clearly defined as a "conveyor" of pollutants, not a "creator" of pollutants. Petitioner's reading of the statute is also contrary to this Court's decision in *City of Milwaukee*, which found that overflows from a city sewer system of sewage and



stormwater runoff constituted point source discharges even though neither the sewage nor the stormwater originated at or were produced by the overflow point sources. *See City of Milwaukee*, 451 U.S. at 318 n.11. If Petitioner's impermissible interpretation is accepted, it would exclude from permit requirements the very thing for which a permit is necessary — the most immediate conveyance of the pollutants entering the receiving waters.

### 3. *The Point Source*

Although Petitioner's concession below, that the S-9 is a "point source," P. App. at 4a-5a, requires it to make the contrived argument that the polluted waters discharged into the Everglades are not "added" "from" the point source, it is plain that Petitioner's real argument is that the S-9 is not a point source. However, the S-9 pump station fits clearly within the classic definition of point source — a pumping station that discharges from pipes. The S-9 is "discernible, confined and discrete," 33 U.S.C. § 1362(14), it is readily identifiable, comprised of several huge pipes with 10-foot heads powered by lift pumps with diesel engines and fuel storage tanks. Each pump discharges pollutants at a rate of 960 cubic feet per second. J. App. at 153-54; Strowd Dep. at 50, 52. The relevant case law supports the conclusion that the S-9 is a point source. *See City of Milwaukee*, 451 U.S. at 318 (overflows into Lake Michigan from city sewer systems which gathered both sewage and stormwater runoff "are point source discharges"); *Amigos Bravos v. EPA*, 324 F.3d 1166, 1169 (10th Cir. 2003) (point source is the "piles" at the molybdenum mine); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (CWA applied to discharge of herbicide); *see also* 2 W. Rodgers, Envtl. L., § 4.10 at 148.

Petitioner's concession below that the S-9 pump station is a point source does not make the S-9 a likely subject for nonpoint regulation.[11] In fact, both the pumping station (a conveyance and discrete structure) and the pipes from which it discharges, are point sources adding pollutants to the Everglades Protection Area and must be regulated as such.

Petitioner's argument that the S-9 pump station should be regulated as a nonpoint source is based on a misunderstanding of the import of the term "point source." The term does not refer to the place where the pollutant was created; it refers instead to the proximate source from which the pollutant is introduced to the destination water body. The term "point source" asks whether the pollutants can be meaningfully regulated by a permitting system. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (holding that "addition" occurs when pollutants are added from "any place outside the particular water body to which pollutants are introduced."). The S-9 pump station is an indentifiable and discrete conveyance and thus presents none of the difficulties that remove nonpoint sources from permit requirements.

11. The Solicitor's argument that Petitioner is the innocent recipient of circumstances beyond its control (S. B. at 27) is contradicted by Florida statutes that describe Petitioner's responsibilities and show that Petitioner has significant statutory control over the development in the C-11 Basin. Petitioner is required by State statute to implement a regional water management plan that gives due consideration not just to flood control and water storage, but also to environmental protection. § 373.036(2)(d)(3), Fla. Stat. (2003). Petitioner has the responsibility to issue consumptive water use and construction permits, including general permits for projects, §§ 373.116 and 373.118, Florida Statutes, and may revoke a permit that is violated. § 373.243, Fla. Stat. (2003).



*See Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) ("Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source.").

### B. The Lower Courts' Rulings Here Are Consistent With The Structure Of The CWA

The first principle of statutory construction is that when the meaning of the statute is plain, the judicial inquiry must end. *See Barnhart*, 534 U.S. at 450. Because the plain meaning of the CWA shows the pumping of pollutants from the S-9 constitutes the discharge of a pollutant, the inquiry should end there. Even if further inquiry were needed, this conclusion is consistent with the overall statutory scheme. *See Owasso Indep. School Dist. v. Falvo*, 534 U.S. 426, 434 (2002).

#### 1. *The Definition Of Point Source Expressly Excludes Certain Water Transfers But Not This One*

The CWA expressly excludes from the definition of "point source" two types of water transfer: [1] water . . . injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well . . . ; and [2] agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(6) and (14). Since Congress specifically excluded these water transfers from the definition of a "point source," other water transfers must be presumed to be potential "point sources." A contrary interpretation would render superfluous the exclusion of certain water transfers. Moreover, the overall statutory scheme of the CWA is to

require permits for all point sources, and to subject those permits to federal supervision through the NPDES program. Where the CWA wanted to provide exemptions to its permit requirements, it did so specifically.

### 2. *Other Provisions Of The CWA Make Clear That Point Sources Need Not Originate Or Produce Pollutants*

Contrary to the Petitioner's contention that a point source must originate the pollutants they discharge, the CWA expressly regulates several types of point sources which by definition do no more than convey pollutants which do not originate in, or are not produced by, the point source. For example, point sources include publicly owned treatment works ("POTW's") which often simply filter and pass through to navigable waters pollutants originating from nonpoint sources. *See* 33 U.S.C. §§ 1311(a-b); *see, e.g., id.* § 1311(h). Under Petitioner's argument POTW's, could not be point sources because the pollutants originate from somewhere else. However, POTW's are considered typical point sources. *See* 33 U.S.C. § 1311(b)(1)(B); U.S. EPA NPDES Permit Writers' Manual, Chapter 2, p.10, Environmental Agency, Office of Wastewater Mgt., December 1996; *see also* S. B. at 22 n.6.

Similarly, the CWA requires permits for point source discharges of "storm water," 33 U.S.C. § 1342(P), which involves "runoff from diffuse sources that eventually pass through storm sewer systems and is thus subject to the NPDES permit program." *Natural Res. Def. Counsel v. EPA*, 966 F.2d 1292, 1295 (9th Cir. 1992). A municipal separate storm sewer:

> means a conveyance or system of conveyances (includes roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): Owned or operated by a State . . . including special districts under State law such as a sewer district, flood control district or drainage district . . . designed or used for collecting or conveying storm water . . .



40 C.F.R. § 122.26(b)(8). Stormwater obviously is not produced by the point source that discharges it. Thus, it is clear that the CWA does not require a point source to originate or produce the pollutants in order for the permit requirement to apply.[12]

Prior to 1994, Section 402(p)(1) of the CWA exempted discharges "composed entirely" of stormwater but required NPDES permits for five classes of discharges including discharges from large urban storm water collection systems (CWA § 402(p)(2)(C), 33 U.S.C. § 1342(p)(2)(C)) and discharges determined either to contribute "to a violation of a water quality standard" in the waters receiving the discharge or to represent "a significant contributor of pollutants" into the receiving water (CWA § 402(p)(2)(E), 33 U.S.C. § 1342(p)(2)(E)). Thus, even prior to 1994, Section 402(p)(2)(E) expressed a clear intent that the Administrator

12. In fact, the C-11 Canal compares very closely, if not exactly, to a municipal separate storm sewer, because it is a "man-made channel" owned by the State "flood control or drainage district" "designed or used for collecting or conveying storm water." 40 C.F.R. § 122.26(b)(8). Under the controlling EPA regulations, the discharged water from the pipes of the S-9 pump station can be defined as "stormwater" because it consists of "stormwater runoff, . . . surface runoff and drainage." *See* 40 C.F.R. § 122.26(b)(13) (2002). Indeed, the C-11 Canal and the S-9 pump station are regulated under Florida's "Everglades Storm Water Program."

could regulate any discharge of stormwater under circumstances where the receiving water body would be impaired or its designated uses compromised. After 1994, Congress gave the EPA the authority to designate by rule additional stormwater discharges for which permits were not already required that needed to be regulated to protect water quality. Further, there is no exception for discharges of polluted storm waters that also happen to be waters of the United States and this provision is entirely consistent with EPA's definition of "discharge of a pollutant." 40 C.F.R. § 122.2. Section 402(p)(1) makes it clear that after 1994 there is no permit exemption for stormwater that is otherwise discharged through a point source. *See* 33 U.S.C. § 1342(p)(1)

### C. The Holdings Of Other Lower Courts Regarding The Meaning Of "Addition," Including the "Dam Cases," Are Consistent With The Eleventh Circuit's Decision

The Eleventh Circuit and the trial court correctly found that Petitioner's discharge of pollutants from the large pipes of the S-9 pump station was not a remote "but for" cause of the pollutants reaching the Everglades Protection Area but instead it was the most immediate cause of the pollutants entering that area and as such constituted an "addition." Pet. App. at 7a-9a and n.7. This is clearly correct because the pollutants would not have entered the Everglades Protection Area without the affirmative backpumping against the flow.

Other circuit courts are consistent with the Eleventh Circuit's conclusion that moving pollutants from one body of water of the United States to another constitutes an "addition" within the meaning of the CWA. *See, e.g., Catskill,*



273 F.3d at 484 (holding that the discharges were an addition requiring NPDES permitting because under normal conditions the polluted water from the reservoirs would never reach the creek); *Dubois v. United States Dept. of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996) (holding addition means pollutants reaching navigable waters through unnatural means); *Dague v. City of Burlington*, 935 F.2d 1343, 1354-56 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (holding that culvert which conveyed polluted waters from Beaver Pond to a portion of Winooski River constituted discharge of pollutants under CWA); *see also Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993) (holding that dam was subject to permit requirement where it discharged collected surface runoff into river below), *cert. denied*, 513 U.S. 873 (1994); *Ala. Rivers Alliance v. F.E.R.C.*, 325 F.3d 290, 296 (D.C. Cir. 2003) (holding that the installation and operation of replacement turbines which released low DO water into the river at an increased rate of 900 cfs was an activity that "may result in any discharge" under Section 401(a)(1)); *Fidelity*, 325 F.3d 1160-64 (holding that discharge of unaltered groundwater into Tongue River required NPDES Permit). Lower courts view the receiving water body to be the relevant waters to which pollutants are added. *See Fidelity*, 325 F.3d at 1162 ("The requirement that the physical, biological, or chemical integrity of the water be a 'man-induced' alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man.").

Moreover, flow-induced water quality changes, such as those caused by dams, need not be found to be point sources in order to be consistent with the Eleventh Circuit's holding. Such flow induced changes (e.g., temperature changes,

dissolved oxygen, and others) are distinct from the pollutants which are drawn into the S-9 pumps and discharged from the pipes into the Everglades Protection Area. Neither *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), nor *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988), compel a result different from the Eleventh Circuit's here. Neither case involved discharges from pipes into protected waters. Neither case involved obviously "permit worthy" structures such as the one here. After slowing or blocking water for a time, the dam in *Gorsuch* thereafter discharged the water into the same water course, where it would have gone in any event. *Gorsuch*, 693 F.2d at 165. In *Consumers Power*, a hydroelectric facility withdrew water from Lake Michigan into a man-made resevoir and generated power by letting the water from the resevoir flow through turbines and back into Lake Michigan. *Consumers Power*, 852 F.2d at 581. By contrast, the S-9 pumps interrupt the natural flow of the C-11 Canal and rapidly backpump waters containing pollutants into another body of higher quality waters into which the waters would not otherwise have reached. The decision here will likely have no effect on "dam cases" such as *Gorsuch* and *Consumers Power*.

## II. THE PETITIONER AND THE SOLICITOR GENERAL ARE ASKING FOR JUDICIALLY CREATED EXEMPTIONS TO THE CWA

While purporting to make a "plain language" argument, Petitioner and the Solicitor General seek to carve out exemptions to the CWA that are not contained in the statute. Here, it is not EPA, the agency that administers the CWA, that seeks the exemptions because the agency took no position in the courts below or here. The position of the United States



is presented by the Solicitor General who is not entitled to deference under *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1986). Moreover, the exemptions urged here have no basis in the plain language of the CWA. The Solicitor's argument is also contrary to prior positions of the United States and the EPA.

### A. Section 304(f) Does Not Exempt Petitioner From The NPDES Permit Requirements

Petitioner contends that Section 304(f) of the CWA identifies structures like the S-9 pump station to be nonpoint sources of pollution. P. B. at 28-32. This argument is foreclosed by Petitioner's concession below, and the inescapable fact, that the S-9 is a point source. Moreover, this argument is not supported by a plain reading of Section 304(f), which would create a new set of exemptions to the CWA, and would invalidate several longstanding EPA regulations and settled case law.

Section 304(f)(1) calls for EPA guidelines over nonpoint sources and requires procedures and methods to control pollution from certain activities. 33 U.S.C. § 1314(b)(1). Section 304(f)(2) lists numerous activities, which may result in nonpoint sources of pollution, including runoff from agricultural, silvicultural, mining, construction activities and "changes in the movement, flow, or circulation of navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2). Section 304(f) calls for regulation of nonpoint sources of pollution caused by these activities but it does not suggest that point sources such as pipes and other conveyances are not treated as point sources when they discharge pollutants in connection with

these activities. To the contrary, the CWA subjects these activities to the NPDES program when the pollutants from those activities are emitted from a discernable conveyance. *See, e.g.*, 40 C.F.R., §§ 122.2, 122.23, 122.24, 122.26, 122.27; *See also United States v. Earth Sciences*, 599 F.2d 368, 373 (1979) (holding that section 304(f) lists activities that "may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation"); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (same); *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980) (same).

There is no intent manifested in Section 304(f)(2) to remove the listed activities from point source regulation. Had Congress intended to exempt the activities in Section 304(f)(2) because they are listed after subpart (1), it would not have done so ambiguously by placing the exemption in a general instruction section of the statute. And the reference to "flow diversion" facility in Section 304(f)(2)(F) does not indicate an intent to remove flow diversion facilities from point source regulation but rather is one example, in many, of a structure whose construction can cause changes in the movement, flow and circulation of water. Nothing in Section 304(f)(2) exempts listed activities from point source regulation.

Labeling the S-9 pump station a flow diversion facility is also inconsistent with the undisputed facts because "flow," which suggests a "gentle or unbroken movement," Webster's Third New Int'l Dictionary at 875, and "diversion," which suggests the act of diverting from one course, *id.* at 662, do not apply to the S-9 pump station which does not divert a flow of water, but backpumps and reverses the flow with massive, not gentle, force. Petitioner misreads Section 304(f)



as establishing an impermeable line between nonpoint and point sources. The fact is that pollutants from nonpoint sources are routinely channelized or otherwise directed to point sources, where their discharge is from a point source and requires a permit.

Section 304(f) is fully consistent with the partnership created by the CWA, which requires state and federal programs to operate in concert and, with regard to point sources, simply provides supplemental regulation, as do other sections of the CWA. *See PUD No. 1*, 511 U.S. at 704 (acknowledging the CWA's supplemental regulatory requirements under 33 U.S.C. § 1313). Petitioner's argument is tantamount to a return to the pre-1972 CWA amendments that relied on States' ambient water quality system without the NPDES enforcement system; this failed system is what the CWA was enacted to correct. These old guidelines (their source is in the 1972 amendments) are the harbinger of what would become "best management practices" for various nonpoint and point sources. *See* 2 W. Rodgers, Envtl. L., § 4.22 at 324-30.

The Solicitor General's Section 304(f) argument is a departure from the position of the United States in *Earth Sciences*, 599 F.2d 368. There, the district court had agreed with a mining company's argument that inclusion of mining activities on the 304(f) list exempted pollution resulting from mining activities from point source regulation. The United States argued for reversal on appeal contending that if Congress had wanted to exclude mining activities from point source regulation, it would not have done so ambiguously "by placing the exemption in a general instruction section of the statute." *Earth Sciences*, 599 F.2d at 372. The appeals court in *Earth Sciences*, accepted the government's argument

and reversed, finding that Section 304(f) did not operate to create a set of implied exemptions and required the mining company to obtain an NPDES permit. *Id.* at 373, 376. The same reasoning holds true here.

### B. The Solicitor General's "Singular Waters" Argument Is Inconsistent With The Plain Meaning Of The CWA

The Solicitor General correctly rejects Petitioner's "original source" argument on the one hand but simply offers an equally absurd interpretation of the provisions of the CWA.[13] The Solicitor General argues that the absence of the modifier "any" before "navigable waters" implies that waters of the United States should be viewed as "singular waters" — an undifferentiated "whole" for purposes of the NPDES

13. The Solicitor General argues that the S-9 pump station discharges are not an addition from a point source because the ordinary meaning of "from" connotes a physical relationship, such as a "point or place where an actual physical movement . . . has its beginning" and the physical movement of the pollutants does not have its beginning at the S-9 pump station. S. B. at 22. Although characterized differently, this argument is the Petitioner's, and is equally inconsistent with the definitions in the CWA, which must be construed broadly. It is also inconsistent with the undisputed facts here. In the House debate on the CWA, Representative Blatnik noted that the strength of the CWA relies heavily on the broad scope of the definitions. 118 Cong. Rec. 10,206 (1972). He noted that:

> [t]o revise any of these definitions is to upset the common threat of the bill. If there is a part of this bill that can be labeled "most important," it is these definitions. To revise them in a way to limit their coverage is to severely detract from the effectiveness of the bill.

*Id.*



requirement. S.B. at 19. The Solicitor's theory is that the CWA regulates pollutants where they are first discharged into waters of the United States — never afterwards. This theory implies an analogy to the problem of non-point pollution where there is difficulty in regulating the source of the pollution. No such difficulty exists here because the pollutants are being discharged from a point source, against the natural flow, into waters which would not otherwise receive the pollutants.[14] The Eleventh Circuit correctly rejected the argument in a footnote. *See* Pet. App. at 8a, n.8.

EPA General Counsel also previously rejected the "singular waters" theory advanced here by the United States, noting that to use the all-encompassing definition of navigable waters "as a basis for exempting them from the permit requirements appears to fly directly in the face of clear legislative intent to the contrary." Decision of General Counsel No. 21, June 27, 1975 at 73. The First Circuit also rejected a similar argument in *Dubois* where the facts showed that the transfer of water from the Pemigewassett River to Loon Pond "would not occur naturally." *Id.* at 1297. The First Circuit took judicial notice that the Pemigewassett River was for years one of the most polluted rivers in New England and that under the "singular waters" theory the court would have to reach the same conclusion regardless of how polluted the river was or how pristine Loon Pond was. *Id.* The court concluded that Congress could not have intended such an irrational result. Indeed, the Solicitor's argument would have the absurd consequence of allowing pollution of all of the

14. Petitioner's argument that the C-11 Canal and the Everglades Protection Area are not distinct water bodies (P. B. at 46) is inconsistent with the undisputed facts of this case which show two distinct bodies of water with drastically different water quality. *See* J. App. at 150 ¶¶ 30-32, 37; *see also* Pet. App. at 8a n.8.

waters of the United States, regardless of the means of conveyance and discharge, as long as the pollutants were drawn from a polluted navigable body of water.[15]

The Solicitor General's argument confuses the jurisdictional issue of what are navigable waters, *cf. Solid Waste Agency of Northern Cook County v. U.S. Army Corps Of Engineers*, 531 U.S. 159 (2001) (considering the Corps' jurisdiction under the CWA), with the environmental issue of how separate bodies of navigable waters, containing different constituents, having different water quality, and serving different functions, can be lawfully connected or mixed. It is beyond dispute that within the vast and varied jurisdictional waters of the United States, the constituents and the quality of the waters can have extreme differences; and the pollutants contained in one navigable water body should not be used as a license to convey those pollutants to another.

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15. In a different context, other cases have rejected this argument because "pollutant" is defined to include "dredged spoil" which by definition must originate in the water body. *See Deaton v. United States*, 209 F.3d 331(4th Cir. 2000) (redeposit of excavated material from wetlands constituted an "addition" under the CWA); *Avoyeless Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-25 (5th Cir. 1983) (redeposit of vegetation and other materials excavated from wetlands constituted an "addition" under CWA); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (redeposit of spoil churned up by propellers constituted the discharge of pollutant under the CWA), vacated and remanded on other grounds, 481 U.S. 1034 (1987), *readopted in relevant part*, 848 F.2d 1133 (11th Cir. 1988); *Rybacheck v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel extracted by gold miners and redeposited into the stream bed from which it was extracted constituted an "addition" of a pollutant under the CWA).



Neither the undisputed facts nor the applicable case law supports the Solicitor General's facile conclusion that this case involves simply transferring "navigable waters" from a water collection canal through a levee to a water conservation area. The S-9 discharge adds all sorts of pollutants, including phosphorus, at dangerously high levels for the receiving waters. The Solicitor General's argument that the pollutants here merely "pass" through the point source ignores the undisputed facts which show that the canal waters could never "pass" to the Everglades Protection Area in the course of its natural flow to the sea. S. B. at 16. Instead, a powerful pump forcibly interrupts and reverses the canal's natural easterly flow and draws water from the east, away from its natural flow, and deliberately dumps the polluted water west into the higher quality waters of the Everglades Protection Area. Worse, the Solicitor General's "singular waters" theory would do grave damage to the CWA by reading already polluted navigable waters out of the definition of "pollutant." 33 U.S.C. § 1362(b). This interpretation would sanction any number of rearrangements and redeposits of pollutants that could claim earlier introduction in navigable waters and presents the court with a radically amended definition of "discharge of a pollutant" that is certain to harm the water quality of all downstream States and Tribes.

### C. Neither Sections 101(g), Nor § 202(2), Nor The "Traditional Powers Of The States" Exempt Petitioner From The NPDES Permit Requirements.

Under the guise of applying the "clear statement rule" to the CWA, and relying on *Solid Waste Agency*, 531 U.S. at 173, Petitioner argues that applying the permit requirements of the CWA here would strip the states of their traditional

powers over water management and land-use planning. P. B. at 34-35. Petitioner and the Solicitor General propose exemptions to the CWA under Section 101(g) of the CWA, 33 U.S.C. § 1251(g). They argue that Section 101(g) supports non-regulation of water management systems because regulation of water quality should not be allowed to interfere with allocation of water by the States. S. B. at 25 n.11; P. B. at 2-3. Some amici also contend that applying NPDES permitting requirements to Western water collection and distribution networks would contravene Section 101(g). These arguments misread Section 101(g).

This Court has specifically recognized the fundamental distinction between land-use regulation and allocation of water rights among users, and environmental regulation embodied in water pollution control measures. *See PUD No. 1*, 511 U.S. at 720. The latter does not abrogate proprietary rights as contemplated by Section 101(g), but merely regulates the quality of the allocated water. *Id.* Section 101(g) preserves "the authority of each State to allocate water quantity as between users; [it] does not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *Id.* The purpose of Section 101(g) is to ensure that the apportionment of State water *rights* between users are not subverted and any effects regarding allocation are prompted by legitimate and necessary water *quality* considerations. 3 Legislative History of the Clean Water Act of 1977, Serial No. 95-14 at 532 (Comm. Print 1978). Allocation of water, pursuant to Section 101(g), contemplates the ability of a state to establish appropriative water rights such as priority, quantity, or beneficial use. *Id.* It does not signal a significant shift in the balance of federal-state power. *Id.* To the contrary, the legislative history explicitly recognizes the historic



allocation rights associated with State land-use and planning programs and seeks instead to protect those rights as distinct from the environmental regulation of water quality for which the CWA was designed. *Id.*

Moreover, unlike *Solid Waste Agency,* where there may have been an overlap between land-use planning and environmental regulation, no such situation exists in this case. The regulations at issue do not attempt to enlarge federal jurisdiction by imposing a limitation on the use or amount of water pumped by the S-9 pump station. Rather, the permit requirement centers on regulating the quality of the polluted waters conveyed by the pumping station.

The "water allocation exemption" argument also misrepresents the function of the S-9 pump station because by no stretch of the facts, or the imagination, does the S-9 allocate quantities of water among users. The S-9 is simply disposing, not allocating.[16] Nor can the dumping be justified as "beneficial" as Petitioner would have the Court believe. P. B. at 11. Nothing in the record supports Petitioner's argument that it is "beneficial" to the Everglades Protection Area to receive polluted waters containing high levels of

16. It is not the need for water in the Everglades that flips the switch of the S-9 pump station — it is the water levels in the C-11 Basin. The switch is flipped on when the canal level reaches four feet above sea level and switched off when the water has been lowered to one foot above sea level. P. B. at 11. Petitioner is collecting, conveying, and disposing of mixed waters to the benefit of the C-11 Basin, not for the benefit of the Everglades, and in doing so it is intentionally discarding the pollutants into lands where the Tribe lives and works, impairing Tribal uses in order to protect the developments in the west.

phosphorus and other pollutants.[17] The Florida legislature has directed a distinct numeric criterion for phosphorus for the Everglades Protection Area, Section 373.4592(4)(e)(2), which is not directed for other waters such as the C-11 Canal. While the C-11 Basin may have been hydrologically connected to the Everglades Protection Area at some historic time, the C-11 Canal is man-made, dug out for drainage, and its surface waters do not flow into the upgradient receiving waters. While the C-11 Canal is a navigable water of the United States, its backpumping is not natural flow. Petitioner's backpumping, moreover, is causing long-term damage in the water quality of the receiving waters. *See, e.g.*, J. App. at 38-39, 135-36, 154-56, 164-69. The discharge of pollutants, including phosphorus at levels higher than those of the receiving waters, alters the quality of these waters and causes "pollution" as defined in the CWA. *Fidelity*, 325 F.3d at 1162 (citing *PUD No. 1*, 511 U.S. at 705). Altering the quality of the receiving waters, by backpumping polluted water into it, is not beneficial to those waters. It is also a clear example of an activity that requires an NPDES permit.

Finally, Section 101(g) directs federal agencies to develop water quality programs "in concert with" programs to manage water resources: "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert

17. Both the State and the EPA have formally determined pursuant to Section 303(d)(1)(A) that the WCA 3A is failing to meet its designated uses. *See* 33 U.S.C. § 1313(d)(1)(A). The Section 303(d) list identifies the water quality limited segments of every Florida water body. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Pumping massive quantities of polluted water into an already polluted section of the Everglades is irreconcilable with the CWA's requirement that pollution that impairs designated uses be eliminated.



with programs for managing water resources." If water supply transfers may be made without notice to, or review or regulation by, State NPDES permit-writers, then water management programs can override NPDES programs, contrary to Section 101(g)'s explicit directive that the two types of programs operate "in concert." *See, e.g., PUD No. 1*, 511 U.S. at 704 (explaining the distinct roles of the federal and state governments and referring to state water quality standards as providing a supplementary basis "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.") (citing *California*, 426 U.S. at 205).

### D. The Rule Of Lenity Has No Application Here

Petitioner's argument that the criminal penalties of 33 U.S.C. §§ 1319(c)(1) and (2) require the CWA to be strictly construed is mistaken. The Petitioner cites two cases in which this Court has applied the rule of lenity in "a civil setting." However, in both cases the United States government was a party seeking the civil application of a statute which had "criminal applications that carried no additional requirement of willfulness." *See, e.g., United States v. Thompson/Center Arms Company*, 504 U.S. 505, 517-18 (1992) (criminal tax statute); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (criminal statute prohibiting private compensation for government employees). This civil suit was brought by private parties under the CWA, which carries criminal penalties but only if the requisite scienter requirements are met. *Compare* 33 U.S.C. § 1319(d) (strict liability for civil claims) *with* 33 U.S.C. § 1319(c) (criminal penalties for negligent or knowing violations). Thus, there is no precedent or basis for applying the rule of lenity in this context.

Even assuming the rule of lenity could apply in this civil suit, it "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994). The rule could have no application here because the plain language, purpose, structure and history of the Act unambiguously show that a permit is required for the discharge of pollutants from the S-9 point source.

## III. REQUIRING AN NPDES PERMIT FOR THE S-9 STRUCTURE PROMOTES FEDERALISM AND DOES NOT CREATE AN UNDUE BURDEN UPON WATER SUPPLY DISTRICTS OR EVERGLADES RESTORATION

A proper federalism balance is fully maintained by implementing the plain meaning of the CWA; and the principles of this case do not create an undue burden upon water supply districts or the Everglades restoration project.

### A. The CWA's Permit Requirements in This Case Are Consistent with Principles of Federalism and Do Not Interfere with "Traditional Powers" of the States

Enforcement of the CWA's NPDES permit provisions does not raise any federalism concerns because the provisions of the statute carefully balance these two interests. *See PUD No. 1*, 511 U.S. at 704 (the CWA establishes distinct roles: EPA is required, among other things, to establish and enforce technology-based limitations on "individual discharges" into the country's navigable waters from point sources, and the states are required, subject to federal approval, to establish



comprehensive water quality standards). The permitting program provides a regulatory partnership between the state and federal government, *see Ouellette*, 479 U.S. at 490, and recognizes the important role of the states, but requires federal supervision as a result of the states' prior failures at self-regulation. *See* 118 Cong. Rec. 10,203, 10,251 (1972).

What Petitioner is requesting from this Court is to interfere with that careful balance, distort the plain meaning of the definitions and create new exemptions. Although NPDES permits contain restrictions on discharges under the provisions of the CWA, the state decides in the first instance the contents of these restrictions. *See* 33 U.S.C. § 1342(a); 40 C.F.R. § 122.44(a). Permits allow discharges and do not prevent Petitioner from continuing to develop a comprehensive plan for water management. Nothing in any of the federal acts cited by Petitioner displaces the clear requirements of the CWA. Indeed, they expressly require compliance with any applicable federal law. *See* WRDA 2000 § 601(i)(3) ("Nothing in the agreement established under this subsection shall alter or amend any existing federal or state law, or the responsibility of any party to the agreement to comply with any federal or state law."); WRDA 1996 § 528(b)(4)(B) (requiring compliance with "any applicable federal law"). Nor would a single state permit, which is not subject to EPA oversight, substitute for the NPDES permit requirements of the CWA. If an NPDES permit is required, that is the type of permit that must be obtained.

Moreover, Petitioner's exaggerated claims that this case will violate existing federalism arrangements if an NPDES permit is required for the S-9 pump station is contradicted by the fact that the major components of Everglades restoration in the Everglades Construction Project are already

under the NPDES permitting program. EPA first required Florida to obtain an NPDES permit for an Everglades restoration project in 1994 (before the State had CWA delegation). *See, e.g.*, EPA Permit No. FL0043885 (authorizing discharges from the Everglades Nutrient Removal Project to receiving waters at the L-7 canal in WCA 1). Petitioner has been applying for, and receiving Everglades NPDES permits at the very same time it is telling the courts that NPDES permits are unworkable for Everglades restoration. The Petitioner received NPDES permits for the STA (stormwater treatment areas), projects which authorize the discharge of treated waters. *See, e.g.*, NPDES Permit No. FL-0177946; (STA-2) FL-0177954 (STA-5); FL-0177962 (STA-1 west); Drew Dep. at 43-44. It would be a contradiction indeed to require NPDES permits for discharges from the storm treatment areas but to excuse them for the discharges from the S-9 pump station. Such contradiction is not found in the CWA.

### B. The CWA's Permit Requirements In This Case Do Not Impose An Undue Burden Upon Water Supply Districts Or Upon The Everglades Restoration Project

A proper analysis of the legal principles supporting the NPDES permit requirement in this case demonstrates that these principles would not impose an undue burden on water supply projects or upon the Everglades restoration effort itself. Despite the doomsday scenarios of the Petitioner and amici, the burden is not significant for several reasons: (1) the common dam structures which are significant components of water-supply projects are not covered by the principles of this case; (2) structures which release or eventually allow flow in the direction of natural flow are not



covered by the principles of this case; (3) EPA can use guidance and rulemaking to clarify other areas of non-application (e.g., substances in water which are not listed as statutory pollutants may be excluded as "pollutants" by rule if not leading to "pollution" as statutorily defined); (4) the few remaining areas of NPDES application under the principles of this case present no significant problems because the burden can be eased through permitting provisions, such as general or nationwide permits and single system-wide permits, and discharges are not likely to violate water quality standards in any event due to the designated use of the receiving water body; and (5) Everglades restoration will be aided because most restoration components already are required to obtain NPDES permits and such permits provide a necessary backstop to ensure that water quality goals are achieved.

1. Petitioner and amici make the totally unsubstantiated claim that water allocation dams, not at issue here, will be covered by the principles of this case. Petitioner asserts that the EPA position in *Gorsuch* — that water quality effects of flows from a dam were not a discharge from a point source — will be overruled if the Court requires a permit for the S-9 pump station. However, as discussed previously, requiring a permit here is not at odds with *Gorsuch* or with EPA's informal position there that the dam releases were not "additions" under the CWA. This case deals with classic external pollutants, taken into the point source and discharged from it against the natural flow, so that these external pollutants would not have entered the receiving water body without the affirmative pumping of the point source. *Gorsuch* concerned temperature changes, oxidation, *etc.*, caused by the changed movement of the dammed water, which is an entirely different situation. And *Consumers Power*, another

so called "dam case," returned the water to the same place from which it was drawn. This is likewise simply not the circumstance here.

2. The principles of this case will not require NPDES permits for the various water supply structures which store, release or eventually allow water to flow in the direction of natural flow. This is because, in order to require a permit, the point source must introduce the pollutant into navigable water from any place outside the particular water body to which pollutants are introduced. *See* Pet. App. 5a-9a; *Catskill*, 273 F.3d at 491-92. If the pollutants were naturally flowing into receiving waters in any event, then a point source is not the "instrumentality" or "cause" or "reason" of additional pollutants in the receiving waters; and the point source likewise does not affect "an increase in numbers, size, or quantity" of pollutants in the receiving waters.

3. In any event, sound statutory interpretation and the EPA administrative implementation would still prevent unnecessary permitting. For example, EPA could use its guidance and rulemaking powers to address the issues associated with discharges against natural flow of substances, which are not listed in the statutory definition of "pollutants." If a material or substance is listed in the statutory CWA definition of pollutant, 33 U.S.C. § 1362(6), of course its discharge requires a permit. But the major concern of water supply districts is with substances in water which someone might consider to be "pollutants" but which are not itemized in the statutory definition. In some, or perhaps many instances, these potential "pollutants" may not be harmful either to the contributing water or to the receiving water. While these are clearly not the facts herein, many amici have been misled nonetheless into thinking that the principles of



this case would require NPDES permits in all such circumstances but this is not a foregone conclusion.

Statutory interpretation and/or EPA rulemaking can address these issues, which are not before the Court in this case, in other ways as well. For example, EPA might determine that materials or substances not itemized as statutory pollutants need not be classified as "pollutants" if they do not result in "pollution" as statutorily defined (". . . alteration of the chemical, physical, biological, and radiological integrity of the water"). 33 U.S.C. § 1362(19). Likewise, EPA might structure rules based upon whether waters are moved within the same designated uses or water quality standards.

4. Even when an NPDES permit is required, water supply districts could still be permitted through the use of general or nationwide permits and single system-wide permits. *See, e.g.*, 40 C.F.R. 122.28, 123.25. Furthermore, permits in most instances would be readily available because releases of water from and to water supply reservoirs and the like are almost certain to meet applicable state water quality standards, which are based on preserving the designated use of the receiving water body.[18] Water moved

18. The amicus briefs from the western states assert that the vast water collection and distribution networks contain clean water and do not contribute to water quality violations but nonetheless would be required by the decision below to apply for several hundred NPDES permits, Amicus brief of the states of Colorado *et al.*, at p. 3 n.2, or perhaps even millions of permits, Brief of Amici Curiae The Nationwide Public Projects Coalition, *et al.*, at p. 9-10. Colorado, the lead state of eleven Western state amici, asserts that only 4.6 percent of its waters are designated under CWA section (Cont'd)

for water supply purposes through water supply canals and reservoirs, all of which have been designated by the state for water supply use, will almost by definition meet applicable water quality standards. This is not the case here. Instead a drainage canal, utilized for the main purpose of disposing of surface water containing high levels of pollutants, is being backpumped into the Everglades conservation areas without any controls on the quantity and type of water pollutants being discharged.

5. The claim that Everglades restoration will be impaired by the requirement for a permit here, is belied by the current application of NPDES requirements, and the issuance of NPDES permits, to many of the new Everglades restoration structures (discussed previously). In fact, NPDES permitting serves not as a hinderance but instead as a vital backstop to prevent backsliding from Everglades restoration. For example, in 2002 the S-9 pump station itself was slated for water quality clean-up by 2005. *See* Tribe's App. at 4a. But by 2003 the District had dropped this cleanup deadline (*see* Tribe's App. 5a), due to the expectation that the Florida Legislature would eliminate the 2006 deadline (which the Legislature changed to 2016 in general, and to 2036 for the C-11 Basin by approving a Long Term Plan extending C-11

(Cont'd)
303(d) because of failure to meet water quality standards. It further contends that "[t]here is no evidence that transbasin diversions/ deliveries are the cause of any of these impairments." Amicus Colorado at p. 3 n.2. If it is in fact true that the water transport systems of the Western states do not create discharges that contribute to a violation of a water quality standard in the receiving water, the affirmance of the decision below will not impose a hardship on them. Colorado and the Western amici should, therefore, have no fear of NPDES permitting.



compliance). *See* previous discussion and section 373.4592(4)(e)(2), Florida Statutes; and Long Term Plan at 6-86. If pollutants from urban development in western Broward County discharged into the Everglades Protection Area (*see* Tribe's App. at 6a, 7a) are not subjected to regulatory oversight by NPDES permit requirements, the survival of this treasured wetlands is in peril. The CWA requires a permit, and neither Petitioner nor any of the amici have provided any basis in the CWA for the judicially created exemptions they seek.

## CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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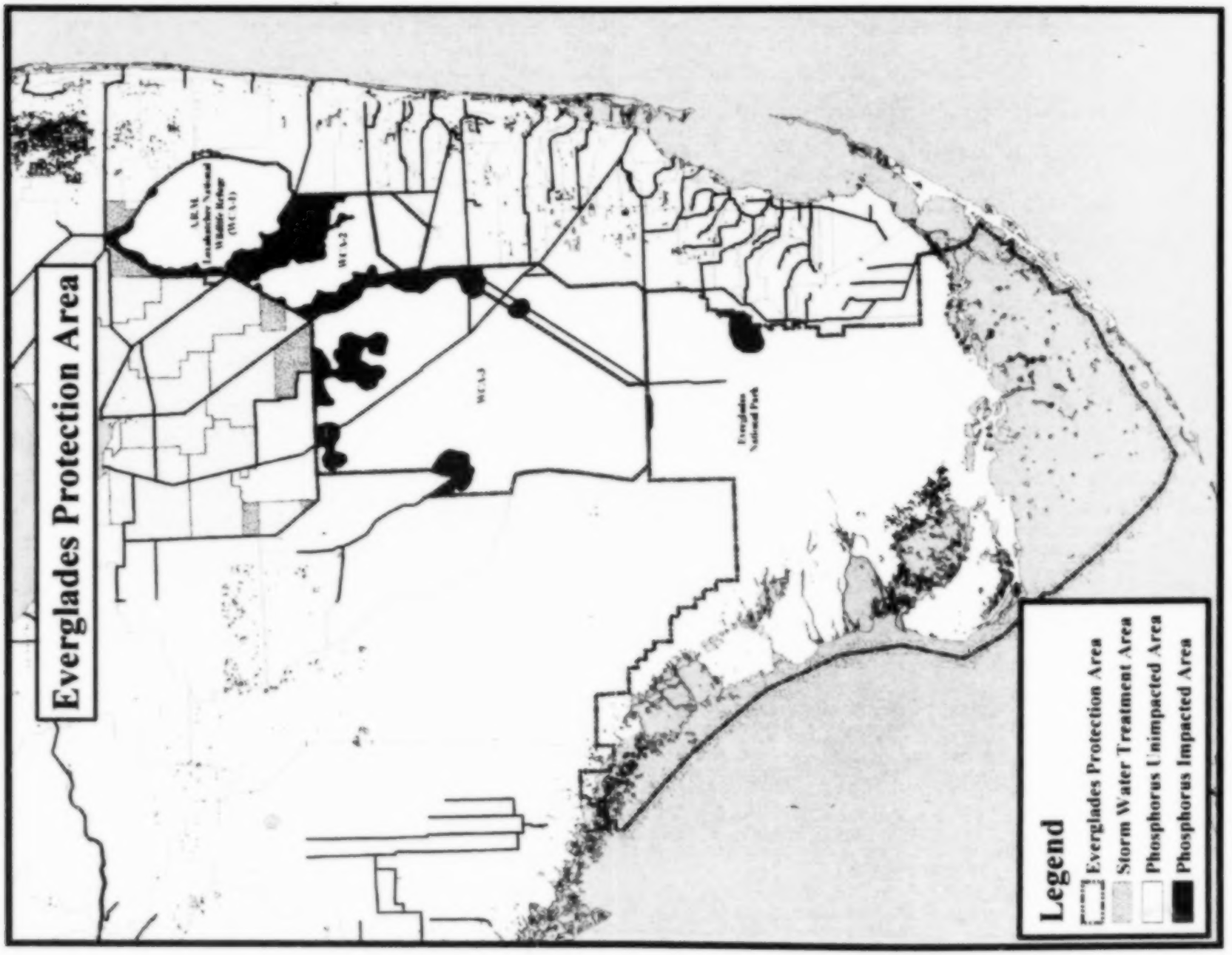
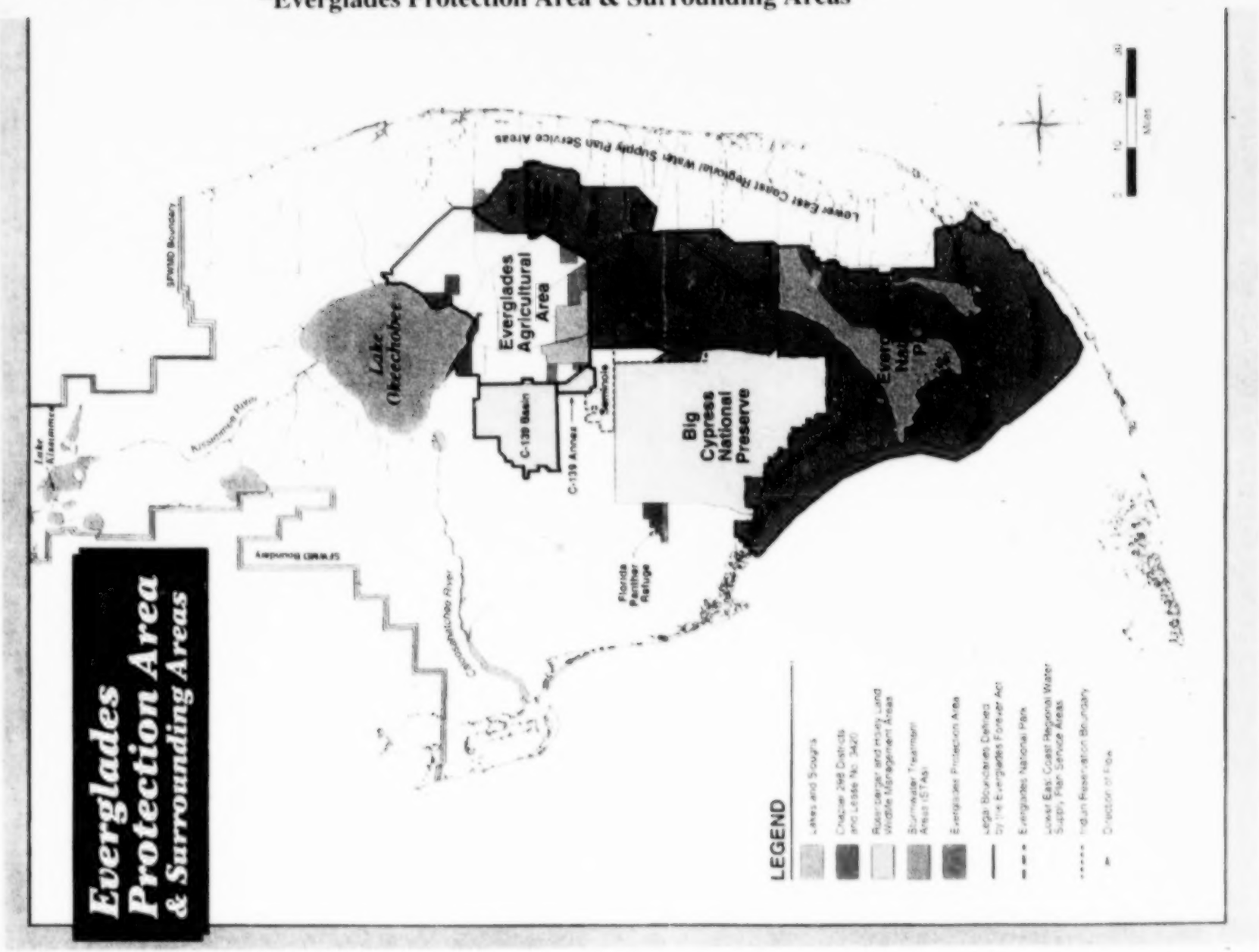
**Appendix A — SFWMD Map captioned, "Everglades Protection Area," available at www.dep.state.fl.us/evergladesforever/progress/map.htm (last visited 11/12/03)**



**Appendix B — SFWMD Brochure entitled "Everglades Program", Map captioned, "Everglades Protection Area & Surrounding Areas"**

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**Appendix C — SFWMD Map captioned, "Figure ES-1. Overview of the Everglades Protection Area and Tributary Basins", Burns & McDonnell, Final Report: Everglades Protection Area Tributary Basins, Conceptual Plan for Achieving Long-Term Water Quality Goals, Executive Summary, dated March 17, 2003, at ES-3, available at http://exchange.law.miami.edu/everglades/restore/FinalConceptual/finalconceptual_031703%20(3.43mb).pdf (last visited 11/12/03)**



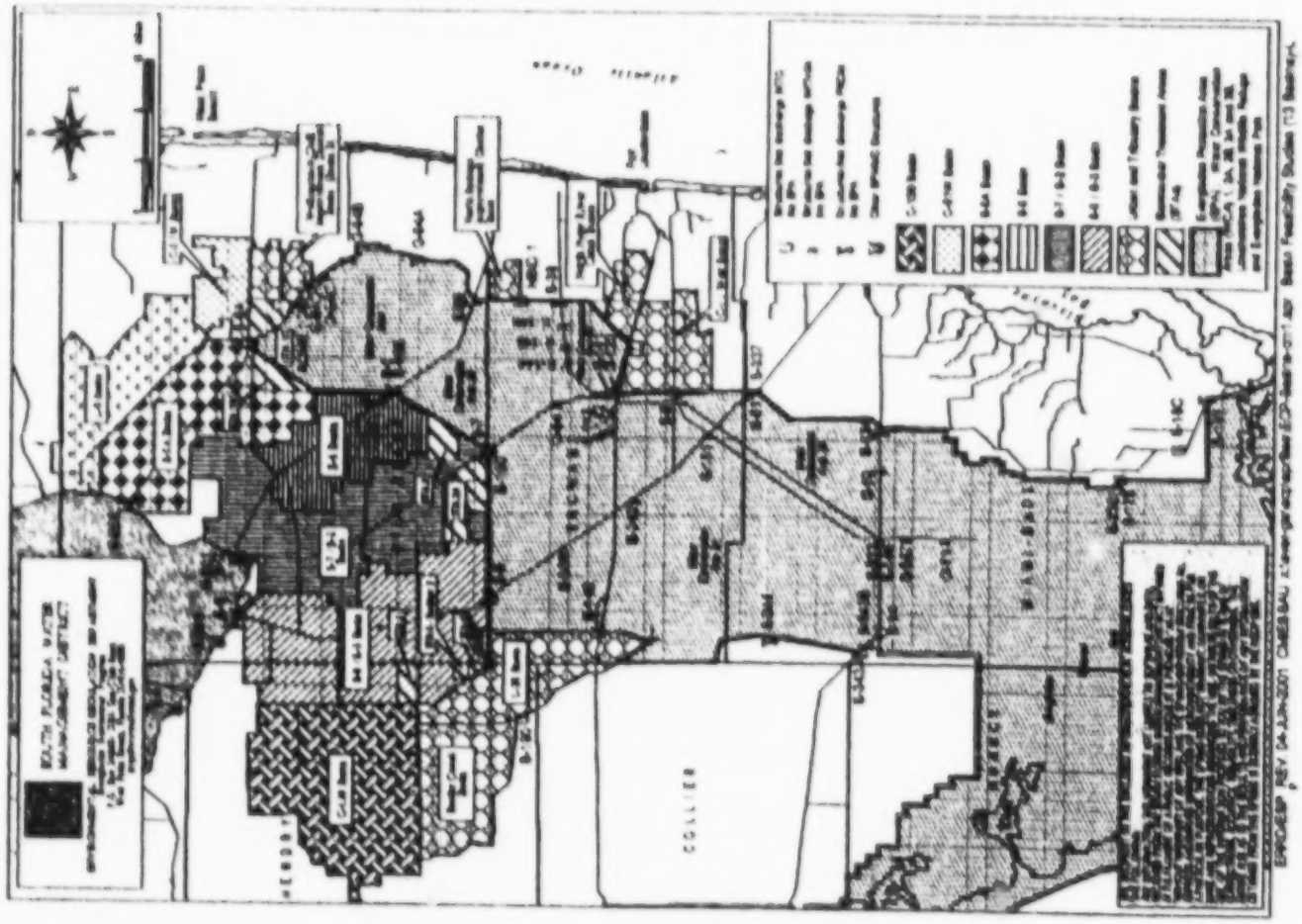
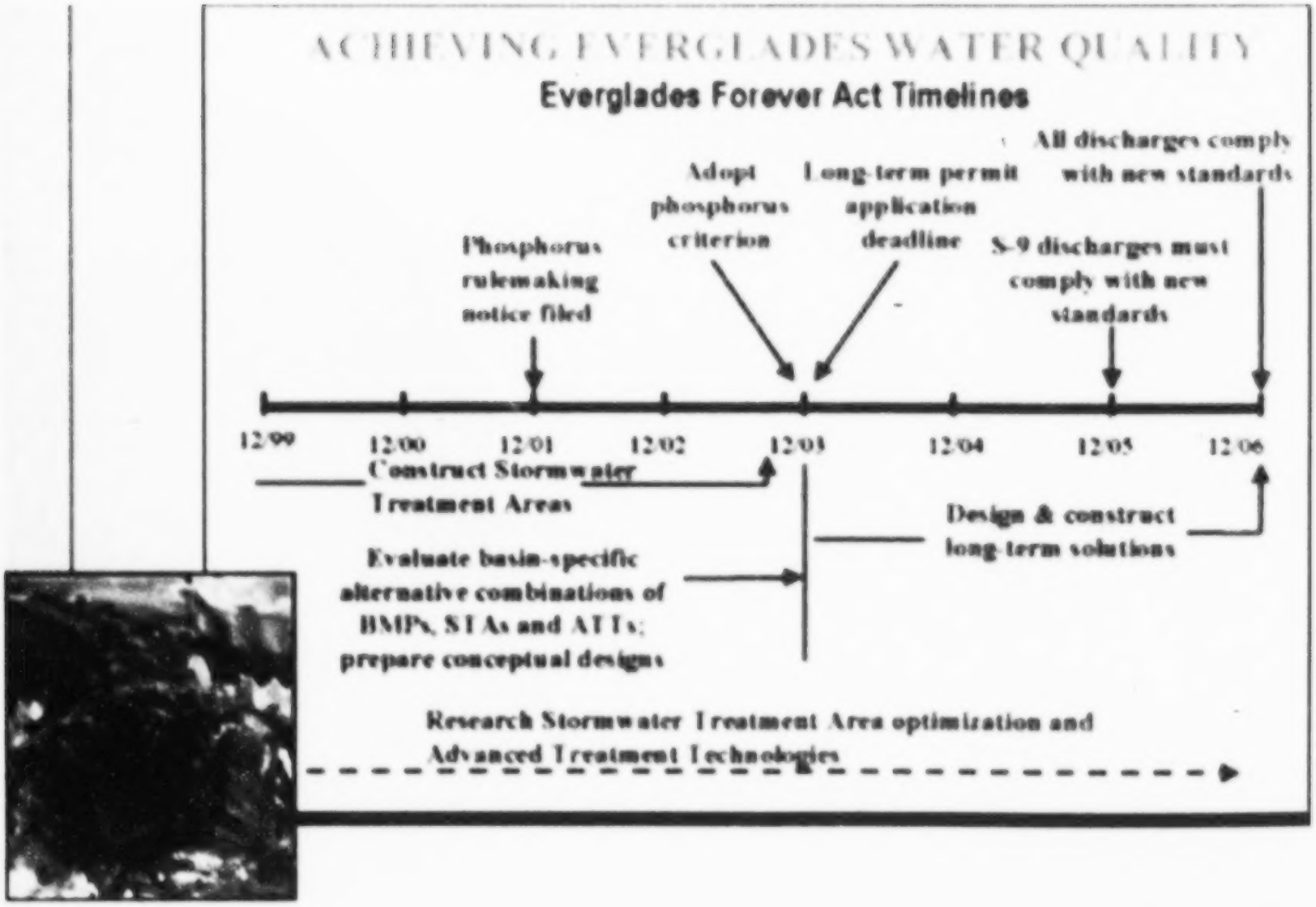
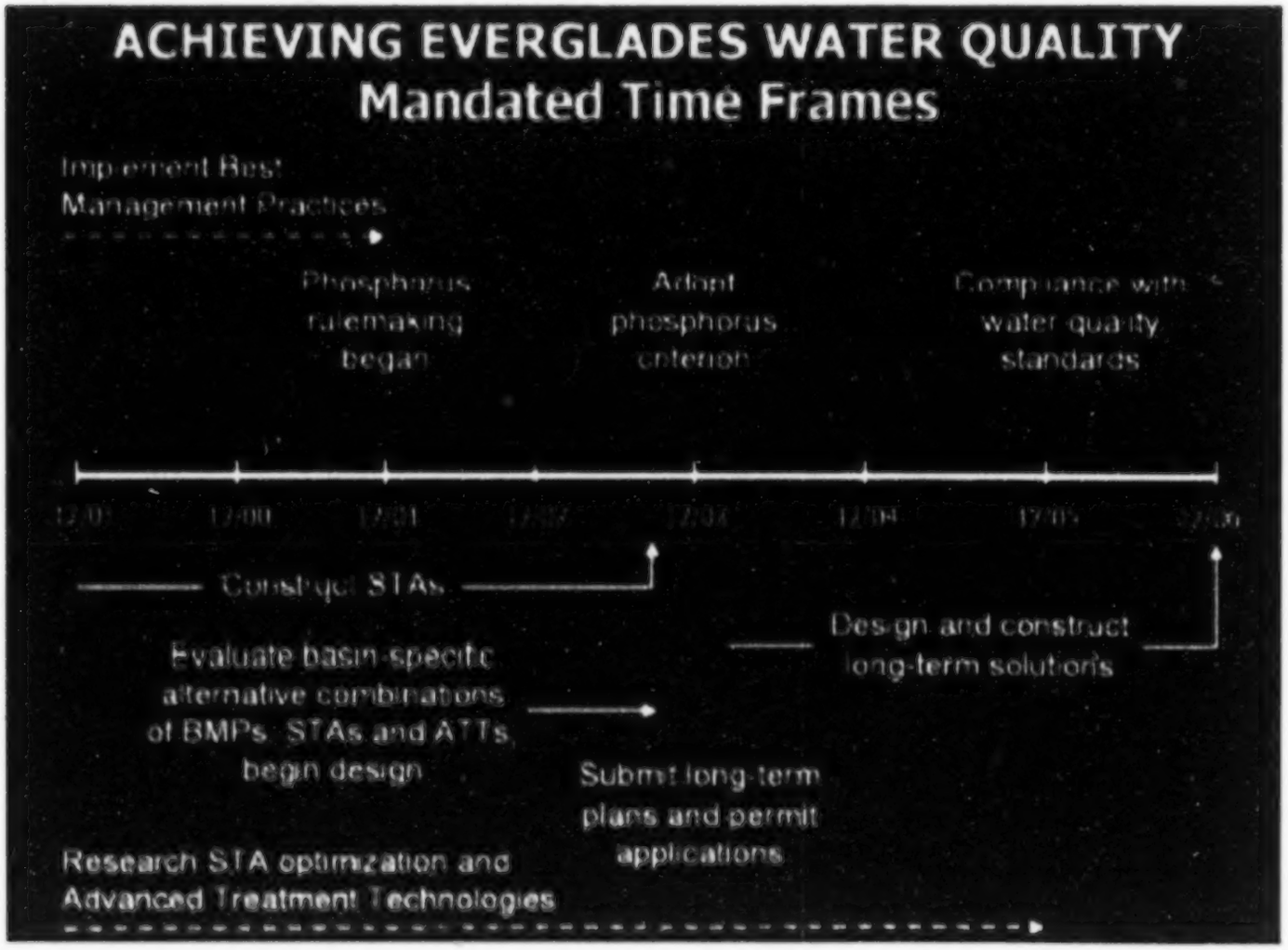


***Figure ES-1. Overview of the Everglades Protection Area and Tributary Basins***
(This Figure includes only SFWMD permit structures, and excludes structures operated by the USACE)

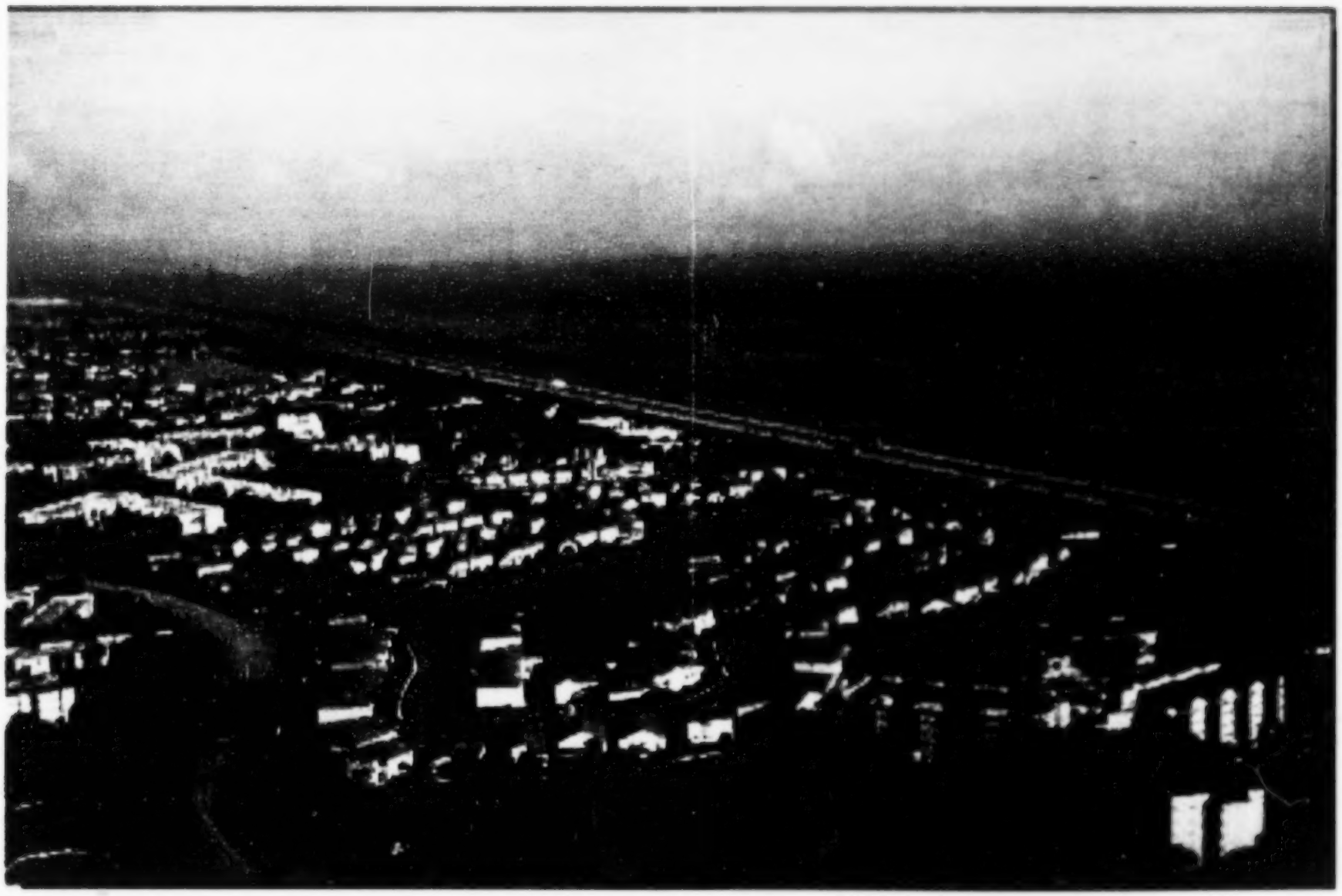
**Appendix D — SFWMD 2002 Everglades Consolidated Report, Executive Summary, Chapter 8A, chart captioned, "Achieving Everglades Water Quality, Everglades Forever Act Timelines", at 24, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03)**



**Appendix E — SFWMD 2003 Everglades Consolidated Report, Executive Summary, Chapter 8A, chart captioned, "Achieving Everglades Water Quality, Mandated Time Frames," at 26, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03)**



**Appendix F — SFWMD 2002 Everglades Consolidated Report, Executive Summary, Chapter 8B, photograph of western Broward County, Florida, at 25, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03)**



**Appendix G — SFWMD 2003 Everglades Consolidated Report, Executive Summary, Chapter 8B, photograph of western Broward County, Florida, at 28, available at www.sfwmd.gov/org/ema/everglades (last visited 11/12/03)**

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 02-626

# In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.
*Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

## BRIEF FOR THE RESPONDENT FRIENDS OF THE EVERGLADES

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## QUESTION

Certiorari has been granted in this case on the issue "whether the pumping of water by a State water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act."

TABLE OF CONTENTS

Page

Question ..... i

Table of Authorities ..... ii

Introduction ..... 1

Statement of Relevant Facts ..... 1

Summary of Argument ..... 9

Argument ..... 15

Grant of Certiorari ..... 15

Point Source Does Not Have To Generate Pollutants ..15

The Natural Everglades and the State of Florida Water Management System Known as the C&SF Project Are Not One Single Water Body ..... 18

Discharges from One Body of Water to Another Are Not Exempted under the Definition of Point Source ..... 23

The Dam Exemption ..... 27

Outside Source Means Any Place Outside the Particular Water Body to which Pollutants Are Introduced ..... 29

The Discharge from the S-9 Pump Station into the Everglades Is Not a Nonpoint Source Flow Diversion Facility under Section 304(f)(2)(F) ..... 32



The Structure of the CWA Point and Nonpoint Source Control: Balance Between Federal and State Responsibilities ..... 35

The Eleventh Circuit Decision Facilitates the Traditional Federal-State Balance of Powers ..... 38

S-9 Permit under the Everglades Forever Act ..... 39

Florida's Nonpoint Source Program for the Everglades Has Been Ineffective and Driven by Lawsuits for Failure to Implement a Sound Restoration ..... 42

Section 402 Is Not Limited to Permitting Industrial and Municipal Waste Streams ..... 44

The Solicitor General's Brief ..... 45

Impact of the Eleventh Circuit Decision ..... 47

Conclusion ..... 48

TABLE OF AUTHORITIES

CASES: Page

*Alabama Rivers Alliance* v. *Federal Energy Regulatory Commission*, 325 F.3d 290 (D.C.Cir.2003) .....24

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*Consumer Product Safety Comm'n* v.*GTE Sylvania, Inc.*, 447 U.S. 102 (1980).....23

*Dague* v. *City of Burlington*, 935 F.2d 1343 (2nd Cir.1991), rev'd in part on other grounds, 505 U.S. 557 (1992).....30

*DuBois* v. *U.S. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir.1996) .....30

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*EPA* v. *California ex.rel. State Water Resources Control Board*, 426 U.S. 200 (1976) .....25, 26, 39, 41

*Hodel* v. *Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264 (1981) .....35

*Miccosukee Tribe et al.* v. *SFWMD*, 289 F.3d 1364 (11th Cir.2002).....9

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*Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).....12, 14, 24, 45



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*National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156 (DC Cir.1982) ..... 13, 17, 27, 28, 46

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*PUD No. 1 of Jefferson County et.al.* v. *Washington Department of Ecology et al.*, 511 U.S.700 (1994).....37

*Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997).....23

*Rybachek* v. *U.S. EPA*, 904 F.2d 1276 (9th Cir.1990)....29, 31

*United States* v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir.1979).....31, 33, 24

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STATUTES AND REGULATIONS:

Federal Clean Water Act
§ 101(a), 33 U.S.C.§ 1251(a).....12, 16, 23, 35, 46

STATUTES AND REGULATIONS – Continued Page

§ 101(a)(1), 33 § U.S.C. 1251(a)(1).....16, 23, 35
§ 101(a)(2), 33 § U.S.C. 1251(a)(2)..... 25
§ 101(b), 33 U.S.C. §1251(b).....36
§ 101(g), 33 U.S.C. §1251(g).....37, 38
§ 301, 33 U.S.C. §1311 .....1, 9, 13, 14, 16, 26, 41, 47
§ 301(a), 33 U.S.C. §1311(a)..... 9, 12, 23, 28, 33, 35
§ 301(b)(1)(C), 33 U.S.C.§ 1311(b)(1)(C).....36
§ 301(e), 33 U.S.C. §1311(e).....39
§ 302, 33 U.S.C. §1312.....39
§ 303, 33 U.S.C. §1313 .....19, 36, 39
§ 303(a), 33 U.S.C. §1313(a).....27, 36
§ 303(c)(2)(A), 33 U.S.C. §1313(C)(2)(A).....27, 46
§ 303(d), 33 U.S.C.§ 1313(d).....28, 38
§ 303(d)(4)(b), 33 U.S.C.§ 1313(d)(4)(b).....27
§ 304(f)(2)(F), 33 U.S.C. §1314(f)(2)(F).....11, 14, 32, 33, 34, 46
§ 309, 33 U.S.C. §1319.....41
§ 309(a), 33 U.S.C. §1319(a).....36
§ 401, 33 U.S.C. §1341 .....36
§ 401(a)(1), 33 U.S.C.§1341(a)(1).....24
§ 402, 33 U.S.C.§1342 .....1, 9, 14, 16, 18, 22, 23, 25, 26 28, 30, 33, 35, 38, 41, 44, 45, 46, 47
§ 402(b), 33 U.S.C. §1342(b)..... 35
§ 402(c), 33 U.S.C. §1342(c)..... 35
§ 404, 33 U.S.C. §1344.....34, 38
§ 502(6), 33 U.S.C. §1362(6)..... 13, 14, 16, 17, 26, 41, 44 46, 47, 49
§ 502(12), 33 U.S.C. §1362(12).....9, 10, 12, 15, 22, 23, 47
§ 502(14), 33 U.S.C. §1362(14).....10, 12, 16, 17 33, 36, 42, 44, 46, 47
§ 505, 33 U.S.C. §1365.....41
§ 510, 33 U.S.C. §1370.....36
§ 510(2), 33. U.S.C. §1370(2).....37

40 C.F.R.:
Section 122.....35



STATUTES AND REGULATIONS –Continued Page

Section 122.2.....34
Section 1.22.4(a), (d) .....39
Section 131.12.....36
Section 131.4(a)(1993) .....36

S. Rep. No. 92-414(1091) .....17, 24, 25

Water Pollution Control P.L. 92-500 Legislative History 2 U.S.C.C.A.N. p.3742-3743 (1972) .....17

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C & S F Project for Flood Control and Other Purposes, 1948, P.L.858, §203. 62 Stat.1176.....3, 11

Comprehensive Everglades Restoration Project, 114 Stat 2681, §601(b)(2)(A)(II)(ii) .....47

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§528(b).....40

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Fla. Laws ch. 91-80.....43
Fla. Stat. Ch. 298 .....5, 11
Fla.Stat.Ann.(West Supp.2003):
§373.016.....42
§373.1501 .....42
§373.451- 373.4595 .....5
§373.403(10).....2, 11, 19, 20
§373.413, Rule 40E.....5
§373.4592 (1991) Marjory Stoneman Douglas Everglades Protection Act of 1991 .....2, 19, 22, 43

FORIDA STATUTES AND REGULATIONS –Cont'd Page

§373.4592 (1992).....5
§373.4592 (1994) Everglades Forever Act of 1994 .....2, 22, 44
§373.4592 (3)(e) (2003).....44, 47
§373.4592(1)(g) .....39
§373.4592(2)(e) .....19
§373.4592(2)(h) .....19
§373.4592(4)(a) .....40, 43
§373.4592(4)(f)(3) .....43, 44
§373.4592(9)(k),(i) .....39
§373.4592(10).....39
§403.088.....35

FLORIDA ADMINISTRATIVE CODE:

17- 43.035 .....5
62.302.300(13).....7
62-302.400 .....19, 36
62-302.500(e).....7, 32
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62-302.700(1),(2).....19

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CERP Restudy, 1999.....3, 20, 40



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Webster's New Century Dictionary, 2001 Ed.....10, 24

## INTRODUCTION

The Friends of the Everglades [1]("The Friends") and the Miccosukee Tribe of Indians ("The Tribe") each brought a separate suit against the South Florida Water Management District ("SFWMD"; or, "the Water Management District") to the Federal District Court for the Southern District of Florida (cases #98-6056 & 98-6057), which alleged that the District was violating the Federal Clean Water Act, ("CWA"), §301; 33 U.S.C.§1311, by discharging pollutants from the C-11 Canal in Broward County, Florida, west through the S-9 Pump Station into the Everglades area known as Water Conservation Area 3-A, ("WCA-3A"), without a National Pollutant Discharge Elimination System ("NPDES") permit under §402 of the CWA, 33 U.S.C.§1342. The Federal District Court denied the District's motions for summary judgment against the two Plaintiffs, and granted summary judgment in favor of the Plaintiffs against the District. On appeal the Eleventh Circuit Court upheld the District Court decision, published at 280 F.3d 1364.

## STATEMENT OF RELEVANT FACTS

This Case is about whether an NPDES permit under the CWA is required for the discharge of pollutants from a stormwater management system[2] called the C-11 Basin into

---

[1] Friends of the Everglades was founded by Marjory Stoneman Douglas, author of the book "The Everglades: River of Grass," recipient of the Presidential Medal of Freedom, and leading figure in establishing the Everglades National Park. There are over 6000 members whose interests are in protecting and restoring the Everglades.

[2] Stormwater management system is defined by Florida statute as "a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental

an area of the Everglades ecosystem identified as Water Conservation Area-3A (WCA-3A).

The Everglades ecological system is unique in the world. It is considered one of Florida's and the Nation's great treasures. Marjory Stoneman Douglas Everglades Protection Act. Fla. Stat. §373.4592, ¶1(a) (1991); Everglades Forever Act Fla. Stat. §373.4592 (1994).

In 1948, the Florida legislature described the historic Everglades:

> In its original state the region now known as the Everglades was a vast solitude of sawgrass and water and was aptly termed by its Indian inhabitants the 'Pa-hay-okee', or 'grassy water'. Under natural conditions the waters of Lake Okeechobee would rise over the southern rim of the lake...Everglades and flow slowly through the grass and other vegetation **to escape eastward through a few small rivers which flowed through the east-coast barrier ridge,** or to pass eventually to the sea through the marshes and tangled mangrove thickets which mark the southern tip of the Florida Peninsula.
>
> HR.Doc. 643 ¶ 13, (1948). (Estab. of C&SF Flood Control Project, which was adopted by Congress 1949.) (Emphasis added).[3]

> The **coastal ridge** which Forms the eastern border of the Everglades is a strip of sandy land varying from 5 to 10 miles in width. **It is in general a highly developed urban and a cultural area....**In the coastal and southern areas, waters collecting over the Everglades spread eastward as well as southward, to inundate low urban areas in and adjacent to West Palm Beach, Fort Lauderdale, and Miami.
>
> HRDoc.643 ¶ 17, 34.

---

degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system." Fla. Stat. 373.403(10).

[3] Only partially cited in P.B. 6. What is now the C-11 Canal was at one time the South New River. In the early 1900's, the South New River Canal, now known as the C-11 Canal, was dug to drain to the east the area of Broward County located in the Everglades. J.A. 175. Just north, along the northern border of Broward County, is the North New River, now also a canal. See J.A. Map Exhibit 9.



The Everglades ecosystem that once ran freely from Lake Okeechobee to the south and east through natural rivers to the coast has been altered radically. In 1947, a major flood occurred from the Everglades inundating southeastern populated areas from West Palm Beach to Miami. HR. Doc.643 ¶ 36(h). Existing canals were incapable of controlling the flooding from the Everglades to the east coast. P.B. 7.

As a result of the flooding, Congress adopted the Central and South Florida Project for Flood Control and other Purposes, ("C&SF Flood Control Act") §203, 62 Stat. 1176, P.L. 858, 80th Cong., 2d Sess; P. B. 7, 8. Part of the Project was "to remove excess water from urban and farm lands, to conserve water during dry periods, **and prevent overflow of the coastal areas by water from the Everglades."**(Emphasis added) HR.Doc. 643 ¶ 9, ¶ 7; P.B. 8.

The C&SF Flood Control Act "created three interconnected reservoir areas" (out of the natural Everglades north of the Everglades National Park). HR Doc. 643 at 42 ¶ 59(a). These huge impoundments were called Water Conservation Areas 1, 2 and 3 (WCAs). RESTUDY at 1-15 to 1-17; J.A. Back Pocket; P. B. 8. The WCAs are bounded by levees which allow water to be maintained within them at higher levels than in the surrounding areas HR.Doc 643 at 42-43 ¶ 59(a); P. B. 8. (See Map, J.A.Exhibit 9 ).

These reservoirs, or WCAs, were built to store the maximum-record rainfall, plus the runoff from the area north of West Palm Beach Canal, the Everglades Agricultural

Area[4] and some flood discharge from Lake Okeechobee. Impoundment of these waters would prevent their flowing eastward and flooding the developed areas along the coastal ridge. HR Doc. 643 ¶ 59(a).

Before the separation of the Everglades into three Water Conservation Areas, the area that is now C-11 Basin west of the coastal ridge was part of the Everglades, which remained covered with surface waters year round. J.A. 114 ¶18. Today it is urban and agricultural in character, with significant residential areas. J.A.172 ¶ 18. Over five million people live along Florida's lower east coast. In the C-11 Basin, 136,000 people depend upon the S-9 pump to prevent flooding. 2000 Census. P. B.10-12.

The C-11 Canal runs east-west from the L-33 and L-37 levees[5] to tide waters in the east. J.A. 170-171 ¶ 5 & 10. It provides flood protection for the C-11 Basin, drainage for development, regulation of groundwater to prevent salt water intrusion, and allocation of water for irrigation and to recharge municipal well fields within the C-11 Basin. J.A.109; P. B.10.

There are three major local drainage districts within the C-11 Basin: the Central Broward, Southern Broward and the Weston District. These districts have drainage canals that discharge into the C-11. ("C-11 sub-basin districts"). Fla. Stat. Ch. 298; J.A. 12. The SFWMD issues Management and Storage of Surface Waters Permits to these districts under Fla. Stat. §373.413, Rule 40E.

The L-33 and L-37 levees separate WCA-3 from the C-11 Canal. The levees were constructed west of the coastal ridge, which was the natural eastern edge of the Everglades. The levees thus created new land for development east of the levees in central Broward County, reclaiming the portion of

[4] The Everglades Agricultural Area is 700,000 acres of Everglades south of Lake Okeechobee, and north of WCA-3A.SWIM Plan of SFWMD, March 13, 1992, p.6, 7.

[5] The Petitioner's Brief alleges that the Canal runs from the Miami Canal in WCA3-A to the coast. This is physically impossible since the L-33 and L-37 were constructed. (J.A. 160).



the Everglades between the levees and the coastal ridge. HR. Doc. at 42-43; J.A. Back Pocket; P. B. 9.

The S-9 pumping station was constructed in 1957 at the juncture of the L-33 and L-37 levees, which were constructed the year before in 1956. J.A. 97. The purpose of the S-9 pump station is to serve a large, urbanized area of central Broward County, by discharging urban runoff from the C-11 Canal into the WCA-3A. SWIM Plan Planning Doc. of SFWMD March 13, 1992 p.36, p.46.[6] P.B. 8.

The S-9 pump station pumps the water from the C-11 through pipes 60 feet across the L-33 and L-37 levees into WCA-3A. The pumping operation is described as "backpumping" because the pumping reverses the natural direction of the flow of the water, which is east, to the west. Because of the L-33 and L-37 levees and the higher elevation of the water in the WCA-3A, as well as the natural topography of the land, without the S-9 pump the water from the C-11 Basin could not flow into WCA-3A J.A. 159, 161.

The discharged water from S-9 contains pollutants, including phosphorus in concentrations not naturally found in the receiving waters. In the Everglades, the area immediately surrounding the S-9, and actually quite a distance surrounding the S-9, is very highly polluted. J.A.125.

The Everglades in WCA-3A is a phosphorous-limited system in which concentrations of phosphorous in water above natural background levels cause imbalances in natural populations of aquatic flora and fauna. J.A.164. The nutrient-lean (oligotrophic) condition of the aquatic ecosystem is one hallmark characteristic of the unspoiled Everglades that still exists in WCA-3A. This ecosystem is

[6] SWIM Plan for the Everglades, Planning Document Issued in compliance with the Surface Water Improvement and Management Act (Sec.373.451-373.4595 Fla. Statutes) and Rule 17-43.035, Fla. Administrative Code (Fla. Dept. of Environmental Regulation) and Marjory Stoneman Douglas Everglades Protection Act (Sec. 373.4592 Fla. Statutes), South Florida Water Management District, March 13, 1992.

changed by even slight increases in nutrient concentrations, particularly increases in the concentration of phosphorus. J.A.166. Negative effects on periphyton, which are microbial organisms and algae, occur when phosphorus levels exceed 10 – 20 parts per billion (ppb). J.A. 31, 39-40.

In phosphorus polluted areas one of the first things that changes is that the cattails outcompete the native vegetation that was located in that area, typically sawgrass and rooted floating aquatic macrophytes. J.A. 38.

From the S-9 pump station looking west into WCA-3A there is a monoculture of cattails. J.A. 38-39. Once the cattail stand dominates the area, it doesn't add oxygen to the water the way the rooted aquatic plants and periphyton and the sawgrass do. The native fish do not survive there, nor can the aquatic bugs that fish feed on be found there... "it's a pretty nasty place." J.A. 38

The discharge from the S-9 contains other pollutants which are in excess of Florida water quality criteria. These exceedances were compiled by the Water Management District in a document entitled "Analysis of Historical Water Quality Data for Non-ECP Structures S-9..." prepared by Dr. Timothy J. Bechtel and Steven D. Hill (January 31, 1996, revised February 9, 1996. (Plaintiff's Complaint, Exhibit 2). (See also J.A. 33-41).[7]

In the Bechtel Report it is acknowledged by the SFWMD that there are numerous exceedances of metals water quality criteria (Table 1): pesticides, including ametryn – 4 detects out of 29; atrazine – 16 detects out of 29; hexazinone – 7 detects out of 29; Diuron – 2 detects out of 29; norflurazon – 7 detects out of 14; as well as excursions of dissolved oxygen, specific conductivity, unionized ammonia, total nitrogen, and high levels of phosphorus. Although the criteria exceedances for pesticides do not

[7] Under Florida regulation, a violation of any surface water quality criterion constitutes pollution. 62-302.500(e).



individually reach the toxic level, together they could become toxic to flora and fauna. J.A. 42.[8]

Any discharge of nutrients which changes the flora and fauna is a violation of a Florida narrative water quality standard. Fla. Reg. 62-302.300(13). The flora and fauna have been significantly altered by the discharge of the S-9 pump station in the Everglades. SWIM Plan Planning Doc., 1992 p.5; J.A. 134, 154,164, 167.

The source of the pollutants in the C-11 Canal from the local drainage districts canals are the suburban, urban, agricultural, and industrial stormwater, including a large above-ground refuse disposal area known as the Davie Dump, and a prison, as well as horse ranches and nurseries.[9] J.A. 75, 114. Many of the pesticides originate in suburban-urban habitats. J.A. 124.

Since the Water Management District has been in charge of the C&SF Flood Control Project, hundreds of thousands of acre-feet of polluted water have been pumped into WCA-3A via the S-9. J.A.162.

The water quality being discharged from the S-9 into the Everglades is going to get worse. With the proposed buffers, the relatively clean seepage water coming out of the Everglades will become a smaller and smaller component of the discharged water, and the concentrations of material will thus go up. Many of the new developments have lake systems which retain stormwater and they can contribute water to the ground water system. J.A.89, 122.

The Petitioner Water Management District has known for a long time that rapid urban growth and development within the basins which lie east of WCA-3A represent major water quality concerns for the Everglades.

[8] Each one of the individual pesticides exceedances, although less than the published toxic value, could have a synergistic effect, which could be toxic to a particular organism. J.A.42. Many of the pesticides originate in suburban-urban habitats. J.A. 124

[9] Petitioner alleges seepage is a major source of the water in the C-11. But Petitioner acknowledges that the run-off from the C-11 Basin is much more polluted than seepage. P.B.17-18.

SWIM, Planning Doc.1992, p.36. Continued development pressures in these flood prone areas (which include extensive tracts of former Everglades habitat) have resulted in continual requests for excess water to be backpumped west into the WCAs to meet flood protection or water supply needs. SWIM, Planning Doc. 1992, p. 36.

Since 1992, there has also been a noticeable increase in the volume of discharge entering WCA-3A from S-9 backpumping. In a study entitled Southwest Broward County Study, the effects of land use and water management on water quality in the C-11 Basin was studied by USGS. The study showed that from 1970 to 1993 there were few occurrences when the water level in the C-11 Basin rose above the 4.25 feet sea level. As more and more development proceeded, more and more water management was required to keep the water levels low enough to prevent flooding. J.A. 52.

The Water Management District knew in 1992 that water quality impacts associated with backpumping and rapid urban growth would potentially include increased loadings of nutrients, pesticides, heavy metals, synthetic organic compounds, and polycyclic aromatic hydrocarbons (PAH) in waters discharged into Everglades surface waters. SWIM Plan Planning Doc. 1992, p.36.

Urban and agricultural development have introduced pollutants into the ecosystem at rates that cannot be assimilated. The resulting imbalance of the ecosystem is manifest in declined faunal populations and an increase in invasive flora. Consolidated Report at 1-8. In hindsight, many of these problems are now recognized to be unanticipated effects of the existing C&SF Flood Control Project. They are exacerbated by the inescapable reality that people continue to move to south Florida at one of the highest rates in the nation. Corps Restudy at 3-1.

The result is a currently non-sustainable system of urban, agricultural and natural environments in south Florida that exceeds the capacity of, or is hampered by, the existing



system of water management. Corps Restudy at 3-1; J.A. 45; P.B. 12.

## SUMMARY OF ARGUMENT

The Eleventh Circuit's determination that the Water Management District's discharge from the S-9 pump station is a point source discharge that is adding pollutants to navigable waters of the Everglades in violation of §301 of the Federal Clean Water Act ("CWA") and is therefore required to have a permit under § 402 of the CWA is undisputedly supported by the facts, and is faithful to the clear terms, structure and purpose of the CWA. The core of the Eleventh Circuit Decision is that:

> when a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs.
> *Miccosukee Tribe*, 280 F.3d at 1368-1369, Pet. App. p 7a-8a.

This decision is in line with all other Circuit Courts which have dealt with this issue. The "dam cases" that the Petitioner and the Solicitor General rely on are not affected by this decision. The facts and the issues are distinguishable.

The CWA makes the discharge of any pollutants unlawful unless in compliance with permit provisions of the Act. §301(a), 33 U.S.C. § 1311(a). The term, "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." CWA §502(12), 33 U.S.C. §1362(12). If this definition is met, a point source permit under the NPDES system under the CWA is required. CWA §402, 33 U.S.C. § 1342.

As the Eleventh Circuit observed, the parties do not dispute that the S-9 pump station which includes the pumps and the pipes which convey the discharge over levees, meets the definition of a point source, which is, "any discernable, confined and discrete conveyance..." CWA §502(14), 33 U.S.C. 1362(14), Pet. App. p. 5a. The parties also agree that the discharge contains pollutants. Pet. App.5a. JA 116. Petitioner's own studies of the discharge indicate that numerous state numeric water quality criteria and narrative criteria (prohibiting any nutrient discharges from changing flora and fauna), are being exceeded. JA 33-42. Nor is there any dispute that the area discharged into, the WCA-3A, is a navigable water. Pet. App. 5a.

The issue before the Eleventh Circuit was "whether the pumping of the already polluted water constitutes an addition of pollutants to navigable waters from a point source." Pet. App 5a. The Circuit Court found that, in determining if there is an "addition" to navigable waters the place to begin is to look at the receiving water as the relevant navigable water. This is supported by the plain meaning of the Act. The term is "any addition...**to** navigable waters". §502(12). The word "to" means in the direction of, or toward, not away from. Webster's New Century Dictionary, 2001 edition.

The Petitioner argues that there is no "addition" if pollutants do not originate at the point source. But, as the Solicitor General points out, this is an untenable argument because "point source" means "discrete...**conveyance**". CWA §502(14), 33 U.S.C. §1362(14); and conveyance means to transport. SG.B.21-22 (Emphasis added). The Eleventh Circuit opinion is in concert, holding that the point source is the "agent or instrumentality" or the "cause or reason" by which the pollutants are added to navigable waters. Pet. App. 7a.

Petitioner also argues that there is no "discharge of pollutants" because the C-11 Basin and the Everglades natural area known as WCA-3A are the same body of water and there can be no discharge if the pollutants are already in



the navigable water. P.B. 22, 47, 48. But, the C-11 Canal is a part of a stormwater management system, under Fla. Stat. §373.403(10), which receives urban and suburban stormwater from the canal systems of three local drainage districts within the C-11 Basin. Fla. Stat. Ch. 298, JA 12. These drainage canals are the source of much of the pollutants that are being discharged through the S-9. J.A. 75, 114. The WCA-3A, in contrast, is part of the natural Everglades ecosystem. They are not the same water.

The Petitioner and the Solicitor General both assert that the entire South Florida Everglades ecosystem and the entire water management system in South Florida, constructed under the Central and South Florida Flood Control Act, ("C&SF Flood Control Act") §203.62 Stat. 1176, are one water body. As one water body, the discharge from one to the other cannot be a "discharge of pollutants" because the pollutants are already in the water. Factually this is even more absurd than the argument that the C-11 Basin and WCA-3A are the same.

The South Florida ecosystem is a diverse, complex series of fresh water rivers, lakes, flat gradients of everglades flowing south and east out through more rivers that have been converted to canals and out into saline estuaries. See Everglades Consolidated Report, January, 2003, p.5, P.B. 6. The C&SF Flood Control Project is an amalgam of projects constructed over many years to try to control flooding and maintain urban and agricultural water supply. Both the U.S. Army Corps of Engineers and the Water Management District are now attempting to undo the parts of C&SF where the project is harming the Everglades. That includes tearing down the levees separating WCA-3A and WCA-3B, as well as between WCA-3B and the National Park, to restore sheet flow to these areas. P.B.15-17, Consolidated Report at 7A.

The Petitioner then argues, in the alternative, that the discharge between the two navigable water bodies is not "disposal" ("discharge") of pollutants because the discharge is a "flow diversion" facility and is therefore a nonpoint source of pollution, under CWA §304(f)(2)(F), 33 U.S.C.

§1314(f)(2)(F). P.B.24. This argument ignores the plain meaning of the CWA which says that "**any** addition of **any** pollutant to navigable waters from a point source" is a discharge of pollutants. CWA§ 502(12), 33 U.S.C.§ 1362(12) that is then governed by the NPDES requirements. CWA §§ 301(a) and 402, 33 U.S.C. §§1311(a) and 1342. It also ignores the clear distinction between point source under CWA § 502(14), 33 U.S.C. § 1362(14) and nonpoint source. Clearly, any "confined and discrete conveyance…" is only a point source when the pollutants "are or may be **discharged**." (Emphasis added) The critical difference of a point source is the act of being discharged, within the meaning of the definition of "discharge of pollutants." Any other interpretation would render the terms meaningless.

To find that discharges of pollutants from one navigable water to another is not included in Congress's clear objectives and structure within the CWA would undermine the integrity of the Act. It would throw into confusion what up to now has been clear, that the simplicity of the language of the CWA means what it says.

The Solicitor General argues every water of the United States is a navigable water, and the discharge from one to another would not be adding pollutants "to navigable waters," since the pollutants are already in navigable waters. As a result the discharge from one water to another is a nonpoint source discharge, not a point source, under the CWA. SG.B.p.13. If this logic were upheld Congress's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" CWA §101(a), 33 U.S.C.§ 1251(a) would be severely undermined. The meaning of what is a point source under the CWA would be compromised, and the protections created through the NPDES permit program would be lost to many of our nation's most valued waters.

As stated previously, the determination of what discharges are governed by an NPDES permit is set out in §§ 301, and 502(6),(12)and (14) of the CWA, 33 U.S.C. §§1311 and 1362(6)(12) and (14). It is unlawful to discharge a



pollutant under §301.The "discharge of pollutants" occurs if there is "**any** addition of **any** pollutant **to** navigable waters from any point source." (Emphasis added) This definition has always meant just that – that "any" point source is regulated, unless specifically exempted by the CWA. As this Court stated in *Milwaukee v. Illinois*, 451 U.S. 304 (1981), "Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." Id. at 318.

There is no statutory justification to remove discharges from one body of water to another, if they are adding pollutants, as defined by the Act, § 502(6), 33 U.S.C. §1362(6), **to** navigable waters, from a point source. To do so will be to lose all the protections of the CWA for the waters being degraded by water-to-water discharges.

In arguing that the discharge from one body to another is not an addition the Petitioner and the Solicitor General look to the "Dam" cases, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (DC Cir.1982), and *National Wildlife Federation v. Consumer Power*, 862 F.2d 580 (6th Cir.1988).

The relevant facts and issues of the dam cases are clearly distinguishable from this case. The facts in both *Gorsuch* and *Consumer Power* are that the water body is the same above and below the dams. In this case the Water Management District is "backpumping", reversing the natural flow of the water in the C-11 Basin by operating the S-9 pump. When the S-9 pumps, the water flows from east to west, into the Everglades, in order to be able to discharge stormwater from the C-11 Basin into the WCA-3A. J.A. 159, 161. Without the S-9 pump the polluted water could not flow west past the L33 and L37 levees. J.A. 160-161.

Also, the source of the pollutants in the water in the C-11 canal is from the stormwater collection system of the Ch. 298 Basins within the C-11 Basin. In the Dam cases the source of pollutants was the dam itself, and the sole issue was whether "dam induced" pollutants, which are already in

the water, are added "from an outside source," as EPA has required. *Gorsuch* at 161. The Dam cases did not adjudicate the question as to whether the discharge from one navigable water to another requires a permit, although the EPA used that language.

The Eleventh Circuit held that "outside source" means "any place outside the particular water body to which pollutants are introduced", Pet. App. 6a, n.5. , Citing *Catskill Mountains Chapter of Trout Unlimited, v. City of New York*, 273 F.3d 481, 490 (2nd Cir 2001). That test is consistent with the concept that all point sources, if they discharge pollutants "to" navigable waters, must be regulated.

Both the Petitioner and the Solicitor General point to the current permit for the S-9 to argue that another is not needed. That permit is a nonpoint source permit. The principal difference between the protections from point source discharges and nonpoint sources is that the point source requirements focus on protecting a water body from the addition of pollutants from somewhere else outside the water body; while nonpoint source controls focus on cleaning up pollution within the water body. CWA §§304(f)(2)(F), 319, 33 U.S.C. §§ 1314(f)(2)(F), 1329. The loss of the ability to require compliance with specific water quality criteria at the point of discharge as well as the enforcement mechanisms for complying with specific permit parameters at the point source would insure degradation from the discharge of pollutants not regulated from the point where they enter the water body.

The existence or nonexistence, the effectiveness or the non-effectiveness, of a state's nonpoint source plan has no relevance in the determination of whether a point source is a "discharge of pollutants" under the CWA. That evaluation is made by applying §301 and the definitions set out in §§ 502(6), (12), and (14) of the CWA. 33 U.S. C. §§ 1311, 1362(6), (12), and (14).

Stopping the pollution from coming into the Everglades from the S-9 either by eliminating the discharge or cleaning it up through the requirement of an NPDES



permit does not interfere with the restoration plan for the Everglades. The NPDES permit supports the restoration. It does not conflict with the state's nonpoint source plan, it works in conjunction with it. The nonpoint source projects reduce the pollutants within the C-11 Basin. When it is necessary to discharge water that is polluted into the Everglades through the S-9 from the urban areas to the east, then that discharge is a point source, and must be treated as such under §402 of the CWA.

## ARGUMENT

### Grant of Certiorari

Certiorari has been granted in this case on the issue "whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act."

### Point Source Does Not Have To Generate Pollutants

The Petitioner Water Management District argues since the S-9 pump station adds nothing to the water being pumped that the discharge is not an "addition of any pollutant…from any point source." Petitioner asserts that the word "from" means that the pollutants must originate from the point source. P.B. 24. The Eleventh Circuit interpreted the word "from" to mean caused by, and found that the term "any addition of any pollutant…from a point source" means that the addition was caused by the point source. The point source was the cause-in-fact of the addition. Pet. App. 7a.

The term "addition of any pollutant" is taken from the definition of "discharge of a pollutant" under § 502(12) of the CWA, which states, "any addition of any pollutant to navigable waters from any point source," 33 U.S.C.

§1362(12). Congress made "the discharge of any pollutant unlawful, (CWA §301, 33 U.S.C.§1311), unless in compliance with provisions of the Act, including an NPDES permit under §402 of the CWA. CWA §402, 33 U.S.C. §1342.

The CWA is a comprehensive act of Congress as it was passed in 1972, amended in 1977 and amended again in 1987, with the specific objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. CWA §101(a), 33 U.S.C §1251(a). In order to achieve this goal Congress stated that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by1985." CWA§101(a)(1),33U.S.C. §1251(a)(1).

A "pollutant" under the CWA means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." CWA §502(6), 33 U.S.C. §1362(6).

A "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stick, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. CWA §502(14), 33 U.S.C.§1362(14).

Within this framework, if the Petitioner's argument is upheld it would mean that any pump discharging even from a sewage treatment plant or from an industrial treatment plant would be excluded, because the pollutants did not originate at the pump. There would be few if any point sources that would be governed by the CWA.

Petitioner alleges that the 1972 Legislative History of the CWA supports the argument by language that indicates the goal of the Act is to stop the pollutants where the pollutants originate. The language Petitioner relies on is: "'Congress recognized' in the CWA that to achieve its goals



'it is essential that discharge of pollutants be controlled at the source.'" (P.B. 27, 32).

By extracting this language from its context Petitioner is able to mischaracterize its meaning. In the context of the legislative history, this language is referring to the Act's control strategy of stopping the pollutants at the source of **discharge** to navigable waters.[10] The sentence following the provision quoted by Petitioner states: "Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries." Water Pollution Control P.L. 92-500 Legislative History, 2 U.S.C.C.A.N. P.3742-3743 (1972).

The Solicitor General, in his Amicus Brief, stated that "The Court of Appeals correctly rejected the SFWMD's argument (P.B. 20) that pollutants are added "from a point source only if the source itself is the origin of the pollutants." See Pet. App. 7a n.6. The Solicitor General noted that the District of Columbia Circuit rejected that interpretation more than 20 years ago, Citing *Gorsuch*, 693 F.2d at 175, n. 58. SG.B. 21.

As the Solicitor General noted, the definition of a point source under the CWA is, "a discernible, confined, and discrete *conveyance*, including but not limited to any pipe, ditch channel, tunnel, conduit, well, discrete fissure, container…" (Emphasis added by SG). CWA §502(14), 33 U.S.C.1352(14). These objects typically transport rather than generate pollutants, such as "sewage," "biological materials," and "industrial, municipal, and agricultural waste," CWA §502(6), 33 U.S.C.§1362(6). SG. B. 21-22.

To convey something is to be the "agent or instrumentality," as the Eleventh Circuit found, of

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[10] The context of the quote is: "The control strategy of the act extends to navigable waters…water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries." quoting S. Rep. No. 92-414, at 77 (1971).

transporting, causing the pollutants to move from one place, the C-11 canal, to another, the Everglades at WCA-3A. J. App. at 8, n.6.

**The Natural Everglades and the State of Florida Water Management System Known As The C&SF Project Are Not One Single Water Body**

The Petitioner and the Solicitor General try to overcome the Eleventh Circuit's determination that the S-9 discharge is a point source discharge that needs an NPDES permit under §402 of the CWA by suggesting that the waters of the C-11 and WCA-3A are the same because they are part of comprehensive water management system, the Central and South Florida Flood Control Project, (C&SF Flood Control Project). As a result, they argue, a discharge from one part of that system, the C-11 canal, into another, the WCA-3A, is not a discharge to a navigable water because the pollutants from the C-11 are already in the water. The S-9 is simply moving the water from one place to another within the unitary water system. P.B. 22, 47, 48.

To try to argue that the waters of the WCA-3A and the C-11 Canal are the same the Petitioner builds a series of complex factual assumptions. It is assumed that the C-11 is a part of the C&SF Flood Control Project. It is assumed that the C&SF Project is a unitary water management system. It is assumed that as a comprehensive water management system it manages the entire Everglades ecosystem. Then, with an enormous leap, it is assumed that because it manages the ecosystem, the C&SF Project is therefore a part of the entire Everglades ecosystem. P.B.1, 5, 8,10,11,22, 47 and 48.

The natural ecosystem in South Florida is different than the water management systems that have been constructed to control the natural systems. The natural system is also not one entity. It includes the Kissimmee River, Lake Okeechobee, the Everglades Agricultural Area, the Everglades separated into the three Water Conservation Areas, the rivers and estuaries to the east, and the Everglades



National Park. See SFWMD Everglades Consolidated Report, January 1, 2003, P.B. 5. The water management system is also not just one entity. It is broken down into canals and levees and pumps that are not all interrelated.

The State of Florida has established a water classification system, required under §303 CWA, 33 U.S.C §1313; which is set forth at Fla. Admin. Code § 62-302.400. There are five general classifications: Class I=Potable Water Supplies; Class II=Shellfish Propagation; Class III=Recreation, well balanced fish and wildlife; Class IV=Agricultural Water Supplies; Class V=Navigation, Utility and Industrial.

Within the South Florida ecosystem there are at least four of these classifications: Lake Okeechobee is a Class I water body. The Estuaries to the east and Florida Bay to the south are Class II. The Loxahatchee refuge and the other two WCAs are class III. Within the Everglades Agricultural Area, the canal systems (defined in Fla. Stat. 373.4592(2)(e)), are Class IV waters.

In addition to the five basic classifications are Special Protection classifications, including "Outstanding Florida Waters" and "Outstanding National Resource Waters" These classifications require no degradation of water quality. Lake Okeechobee, the Loxahatchee National Wildlife Refuge, the Everglades National Park are all Outstanding Florida Waters. Fla. Admin. Code § 62-302.700(1),(2). The Everglades National Park is also an "International Biosphere Preserve" and "World Heritage Site," that is home to numerous threatened and endangered species. J.A. 158.

The canal system know as the C-11 Basin is a stormwater collection system, which means "a system...to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use or reuse water to prevent or reduce flooding, overdrainage, environmental degradation and water pollution or otherwise affect the quantity and quality of discharges from the system." Fla. Stat. § 373.403(10).

In fact, these water management systems moving polluted water from the Everglades Agricultural Area and the urban areas that are to the east and discharging into natural areas, including Lake Okeechobee and the Everglades, is one of the principal reasons why the natural ecosystem is in such dire straights now.

The Comprehensive Everglades Restoration Plan (CERP) recognizes that much of the degradation that the Everglades Protection Area, (the CWAs and the Park), are experiencing is a direct result of the C&SF Flood Control Project. The altered water regimes have reduced the area of the Everglades by half and are responsible for a continuing state of decline of that natural area. P.B. 12; RESTUDY at 3-1. Water quality has also been degraded by urban and agricultural development that has introduced pollutants into the ecosystem at rates that cannot be assimilated. P.B. 13; Consolidated Report at 1-8.

The C-11 Canal is quite different than the WCA-3A, in terms of quality, use and function. The C-11 canal is a stormwater drainage basin, as defined by Fla. Stat. §373.403(10). The purpose of the C-11 Canal is to provide flood protection for the C-11 Basin, drainage for development, regulation of ground water to prevent salt-water intrusion, and allocation of water for irrigation and to recharge municipal well fields. J.A. 109. The C-11 basin pollutants come from the urban suburban industrial and agricultural areas within the 298 subbasins that discharge by permit into the C-11.

The water quality in the C-11 Basin that discharges from the C-11 Canal into the WCA-3A through the S-9 pump contains many pollutants which exceed Florida's water quality criteria. J.A.42. These pollutants are causing a significant change in the flora and fauna of the WCA-3A at the discharge point of the S-9. J.A. 134, 154, 164, 167. It is because of these pollutants and the problems they are causing from the C-11 into WCA-3A that the CERP Project has just recently adopted and funded numerous projects to hold the water back in the C-11 and not discharge to the S-9



into the Everglades. The Petitioner Water Management District has acknowledged that restoration projects under the Everglades Forever Act and CERP include several projects to improve the quality of water in the C-11 Basin pumped by the S-9 into the WCA-3A. P. B. 17.

In its natural state, the Everglades flowed south then east through rivers flowing through the coastal ridge to the coast. HR.Doc 643. Several of those rivers, the South New River and the North New River have been converted to canals. The South New River Canal is now the C-11 canal. J.A. 175.

With the operation of the S-9 pump station, the C-11 waters can now be reversed, caused to flow in the opposite direction of the natural flow, which is west to east from the Everglades to the coast. When the S-9 pumps operate, the water flows from east to west, into the Everglades, in order to be able to discharge stormwater from the C-11 Basin into the WCA-3A. J.A. 159, 161.

The Water Management District argued before the Eleventh Circuit that the historical hydrological connectedness of these two bodies of water (1) precludes a finding that the WCA-3A and the C-11 Canal are two distinct bodies of water, and (2) precludes a finding that the operation of the S-9 changes the "natural" flow of water between these two bodies. Pet.App. at 8a n8.

The Eleventh Circuit rejected the Water District's argument, finding that since the completion of the L-33 and L-37 levees (1956), water does not flow from the C-11 Canal into WCA-3A. "**Man has made the two bodies of water two separate and distinct bodies of water**." Pet.App. at 9 n 8.

The Petitioner's argument is that the S-9 discharge is not an addition because, **as a matter of law**, the C-11 and WCA-3A are the same water. P.B. 47, 48.

The basis for the argument is a quote from the Solicitor General's Brief to this Court on the question of Certiorari, that stated the Solicitor General's belief that:

> The C-11 Canal and the WCA-3A can appropriately be viewed, for purpose of §402 of the CWA, as parts of a single body of water. The characterization is appropriate because the C-11 Basin, the C-11 Canal and the WCA-3A share a unique, intimately related and hydrological association. Furthermore, these components were created and are managed pursuant to legislative direction – by both the United States and the State of Florida – as a part of a single integrated resource. P.B. 22, 48.

Thus, in attempting to argue that the C-11 and the WCA-3A are the same water body as a matter of law, the Petitioner and the Solicitor General refer vaguely to "legislative direction", apparently the enabling acts for the Water Management District to run the C&SF Flood Control Project; and for the CORPS of Engineers; and those legislative acts that were passed to deal with the litigation, the "Marjory Stoneman Douglas Everglades Protection Act of 1991, and the Everglades Forever Act of 1994. These acts do not deal with what an "addition" means under the CWA.

There is no basis to conclude as a matter of fact or of law either that the C-11 and WCA-3A are the same water body or that the entire South Florida Everglades ecosystem is the same navigable water as the C&SF Flood Control Project. While the water management system may be considered a navigable water, it is a stormwater management system. It is not the same as the natural everglades ecosystem.

In other words, the discharging of pollutants from the water management system into the Everglades is discharging from one navigable water of much lower quality and much different uses, into another which is a pristine ecological treasure, as the C-11 does into the WCA-3A.



**Discharges from One Body of Water to Another Are Not Exempted Under The Definition of Point Source**

As an alternative to the "unitary water" theory the Petitioner and the Solicitor General argue that if the point source discharges from one navigable water to another that it is not an addition, because the pollutant is already in "navigable" water. There is no language in the CWA that makes that qualification. Every point source is meant to be affected by this requirement.

The starting point for statutory interpretation is the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The first step "is to determine whether the language at issue has a clear and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" 519 U.S. at 340.

The language in the Act is clear and unambiguous. It is unlawful to discharge a pollutant from a point source CWA. §301(a), 33 U.S.C. §1311(a), unless in compliance with the Act. CWA §402, 33 U.S.C §1342.

A "discharge of a pollutant" occurs when there is "**any** addition of **any** pollutants **to navigable waters** from **any** point source. CWA §502(12), 33 U.S.C.§ 1362(12). (Emphasis added). It is clear then that the focus of determining whether there is a discharge of pollutants is to look "**to**" the receiving body of water, as the Eleventh Circuit held. Pet App.at 8a; and determine if there are "**any**" pollutants being added to the receiving water from "**any**" point source.

The meaning of the terms "any" and "to" are unambiguous. "Any" means every or all, in relation to which pollutants and which point sources. Webster's New Century Dictionary, 2001 edition. "To" means simply "motion or direction toward a point, person, place or thing,"

not "from". Webster's New Century Dictionary, 2001 edition.

Congress's intent in enacting the 1972 Clean Water Act Amendments was clearly to establish an all-encompassing program of water pollution regulation S. Rep. No. 92-414, at 95, 2 Leg. Hist. 1511. As this Court stated, the 1972 Amendments established "a comprehensive program for controlling and abating water pollution" In *Milwaukee v. Illinois*, 451 U.S. 304 (1981) this Court concluded that, " **Every point source discharge is meant to be prohibited** unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." Id. at 318.

In a recent decision by the Circuit Court for the District of Columbia the Court looked at the meaning of the term "addition" in relation to CWA §401(a)(1), 33 U.S.C. §1341(a)(1). In this case, the Circuit Court held that, in the case of a discharge from the proposed dam facility, "that even a temporary increase in a discharge could have a negative water quality impact, 'we elect to remain faithful to the language chosen by Congress,' North Carolina, 112 F.3d at 1188, and hold that an activity that 'may result in **any** discharge' triggers the certification requirements of section 401(a)(1), 33 U.S.C. §1341(a)(1)." (Circuit Court's emphasis). *Alabama River Alliance* v. *F.E.R.C.* 325 F.3d 290, 300 (D.C.Cir.2003).

As the Tenth Circuit Court of Appeals found in *U.S.* v. *Earth Sciences Inc*, 599 F.2d 368, 373 (10thCir. 1979): "It contravenes the intent of FWPCA (CWA) and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point."

The objective of the CWA is to restore the chemical, physical, and biological integrity of our Nation's waters. CWA §101(a), 33 U.S.C. §1251(a). To accomplish this, Congress set the goal of the CWA to eliminate the discharge of pollutants into navigable waters. CWA §101(a)(1), 33 U.S.C.§ 1251(a)(1). In the interim, while finding ways to eliminate discharges of pollutants, Congress set the goal of



the CWA to attain water quality that will support fish and shellfish and wildlife. CWA §101(a)(2), 33 U.S.C. 1251(a)(2). In order to implement these objectives and goals the CWA establishes the system of requiring compliance with water quality effluent limitations at the source of the discharge. CWA §402, 33 U.S.C.§ 1342.

The legislative history of the 1972 Act supports the Eleventh Circuit: "The Committee has extracted from the Refuse Act the basic formula and added municipal discharges to it, so that before **any** material can be added to the navigable waters authorization must first be granted by the Administrator, or State in the case of an approved State program, under Section 402." 2 U.S.C.C.A.N. P 3742-3743 (1972). (Emphasis added).

In the case of *EPA v. California ex rel. State Water Resources Control Board ("EPA v. California")*,426 U.S. 200 (1976), this Court dealt with the history of what prompted the 1972 Amendments, beginning with the fact that the federal water pollution program up to that time was "inadequate in every vital aspect." S.Rep. 92-414, Id. at 202-203. This case recognized that the 1972 Amendment introduced two major changes in the methods to set and enforce standards to abate and control water pollution. "First, the Amendments are aimed at achieving maximum 'effluent limitations' on 'point sources,' as well as achieving acceptable water quality standards." *EPA v. California* 426 U.S. at 205. "Second, the amendments established the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations." Id at 205.

The purpose of the major changes was to deal with the problem of enforcement inherent in the prior cumbersome enforcement procedures. The prior procedures employed ambient water quality standards which specified acceptable levels of pollution in the navigable waters, rather than applying the specified acceptable levels at the source of the discharge into the water. As this Court stated in *EPA v. California*, "Such direct restrictions on discharges facilitate

enforcement by **making it unnecessary to work backward from an over-polluted body of water** to determine which point sources are responsible and which must be abated." Id at 204. (Emphasis added) In short, the NPDES permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the CWA. Id. at 205.[11]

In the light of this objective and these goals, and the revolutionary changes of the 1972 Amendments requiring compliance at the source of the discharge, if Congress wanted to qualify this protection, and not to limit pollutants from discharges from one navigable water to another, then it could have specifically done so. Congress, in its definition of the term "pollutant" specifically exempted two categories, sewage from vessels or a discharge incidental to the normal operation of a vessel of the armed forces; and water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production, and disposed of in a well, if the well is approved by the state. CWA §502(6), 33 U.S.C. §1362(6). It could have extended the exceptions to include pollutants from one navigable water to another. It did not.

To find that discharges of pollutants from one navigable water to another is not included in Congress's clear objectives and structure within the CWA would undermine the integrity of the Act. It would throw into confusion what up to now has been clear, that the simplicity of the language of the CWA means what it says.

The whole concept of establishing and enforcing technology based limits on individual discharges into the country's navigable waters from point sources CWA §301 and §402 establishing water quality standards under CWA

[11] The Solicitor General noted that "...the Clean Water Act's NPDES permitting program typically imposes limitations on a point source discharge by establishing permissible rates, concentrations, or quantities of specified constituents **at the point where the discharge stream enters the waters of the United States.** S.G. B.p.6. (Emphasis added).



§303(a), classifying each separate water body in accordance with its use, CWA §303(c)(2)(A), will become superfluous.[12] So, too, would be the requirement that state standards include an antidegradation requirement under §303(d)(4)(b).

## The Dam Exemption

The Water Management District bases its argument that discharges from one water body to another are exempt on language taken from the "Dam" cases, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (DC Cir.1982), and *National Wildlife Federation v. Consumer Power*, 862 F.2d 580 (6th Cir.1988).

The relevant facts of the dam cases are clearly distinguishable from this case. The facts in both *Gorsuch* and *Consumer Power* are that the water body is the same above and below the dams. As the Sixth Circuit noted in *Consumer Power*, the Ludington facility "merely changes the movement...of navigable water when it temporarily impounds water from Lake Michigan in a storage reservoir, but does not alter their character as waters of the United States." *Consumer Power* at 589. The same is true for the river in *Gorsuch*.

In the case of the discharge from the S-9 into WCA-3A, the water flow is reversed from the way the water would flow naturally. In its natural state, the Everglades flowed south then east through rivers flowing through the coastal ridge to the coast. HR.Doc 643. Several of those rivers, the South New River and the North New River have been converted to canals. The South New River Canal is now the C-11 canal. J.A. 175. With the operation of the S-9 pump station, the C-11 waters can now be reversed, caused to flow in the opposite direction of the natural flow, which is west to east from the Everglades to the coast. When the S-9 pumps, the water is pumped over the levees, which would have

[12] See Fla. classifications listed above, Page 19.

prevented any flows from east to west, into the Everglades. J.A. 159, 161.

Also, the source of the water in the C-11 canal is from the stormwater collection system of the Ch. 298 Basins within the C-11 Basin. JA 12, 75, 114,124. There is no question, then, that the pollutants being discharged through the S-9 are from outside the WCA-3A.

Also, the sole issue in the dam cases was, "whether certain dam-induced water quality changes constitute the 'discharge of a pollutant' as defined in §502(12) of the Act, 33 U.S.C. §1362(12)," *Gorsuch*, at 161; not whether the discharge from one navigable body to another is exempt.

The *Gorsuch* and *Consumer Power* Courts relied on an EPA opinion that dams are not subject to an NPDES permit because "(an) addition from a point source occurs only if the point source itself physically *introduces* a pollutant into water *from the outside world,*" and pollution resulting from dams, *dam-induced pollution*, is exempt from needing a permit under § 402 of the CWA. *Gorsuch*, at 165. *Nat'l Wildlife Fed'n v. Consumer Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988).

The EPA language, which the courts repeat, "dam caused pollution ...merely passes through the dam from one body of navigable water (the reservoir) to another (the [illegible] river)," is thus not reflective of the facts in these cases.

What these cases hold is that man-induced changes to the flow of pollutants through discrete conveyances is a discharge of pollutants under CWA §301(a), when pollutants are added from the outside world.

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[1] The EPA language, "merely passes through the dam from one body of navigable water (the reservoir) to another (the river)" is not an interpretive opinion that that a hydropower reservoir whose source is the same river that it discharges back into is a separate body of water, and that as a result of that fact no NPDES is required.



**Outside Source Means Any Place Outside the Particular Water Body To Which Pollutants Are Introduced.**

The Eleventh Circuit considered and dismissed the argument that the point source discharge of pollutants from one navigable water to another is exempt because it is not a discharge from an outside source.

Instead, the Court adopted the definition of the Second Circuit that "outside world" includes "any place outside the particular water body to which pollutants are introduced". *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490 (2d Cir. 2001). The Eleventh Circuit found this interpretation to be consistent with EPA's position and the Eleventh Circuit's determination that a redeposit of soil which has been dredged by a boat's propellers can constitute an addition of pollutants requiring a 404 "dredge and fill" permit, 33 U.S.C. §1344. *U.S. v. M.C.C. of Fla. Inc.*, 772 F.2d 1501, 1505-06 (11th Cir.1985), vacated on other grounds, 481 U.S.1034 (1987), readopted in relevant part, 848 F.2d 1133 (11thCir.1988). (Pet.App. at 7a-8a, n 5.)

The Eleventh Circuit definition of outside source is also consistent with the Ninth Circuit in *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276 (9th Cir. 1990), where a placer mine operation mines for gold by digging in and adjacent to the stream and then discharging non-gold material back. The Ninth Circuit held that "Because the material discharged came not from the streambed itself, but from outside it, its discharge into a waterway clearly constitutes an 'addition.'" Id. at 1285. The Ninth Circuit compared this finding with the deference granted EPA's opinion that pollutants which are added from an outside source are "additions." Id. at 1286.

The Eleventh Circuit concluded that, "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." Pet. App. at 7a. The Eleventh Circuit then held: "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another

distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." Pet. App. 7a.

As the Eleventh Circuit noted, this conclusion is consistent with both the First and Second Circuits. In *DuBois v. US Department of Agriculture,* 102 F3d.1273 (1st Cir. 1996), the First Circuit concluded that the piping of water from the polluted East Branch River for commercial use and its proposed release into the upstream Loon Lake would constitute an addition of pollutants from a point source. Id. at 1296-99. Then, in *Catskill Mountains*, the Second Circuit concluded that the diversion of water from a reservoir containing pollutants by tunnel into a creek for which the reservoir was not naturally a source would constitute an addition of pollutants from a point source. *Catskill Mountains*, 273 F.3d at 492. Both courts emphasized that the two bodies of water were separate and that pollutants would not enter the second body except for the point source. The Second Circuit in *Dague* v. *City of Burlington,* 935 F.2d 1343, 1354-55 (2nd Cir.1991), rev'd in part on other grounds, 505 U.S. 557 (1992) held that a culvert which conveyed polluted waters from Beaver Pond to a portion of Winooski River constituted discharge of pollutants under the CWA.[14]

In a more recent decision the Ninth Circuit held that water from a deep mine that naturally contained chemical pollutants, that were extracted as part of a coal bed methane gas extraction process, could not be discharged into the Tongue River without a §402 permit. *Northern Plains Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155, 1157-1158. (9th Cir. 2003).

The Eleventh Circuit then held that when a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another body of navigable water into which it would not otherwise

[14] This Court has recognized the wisdom of allowing difficult issues to mature through full consideration by the Courts of Appeals. *E.I. DuPont de Nemours & Co. v. Train* 430 U.S. 112 (1977).



have naturally flowed, that point source is the cause-in-fact of the release of pollutants into navigable waters. Pet. App. 7a. Because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs. Pet. App. 7a.

This "but for" holding is consistent with *United States v. Earth Sciences, Inc*, 599 F.2d 368 (10th Cir.1979) where the court rejected a gold mine operator's argument that the point source discharge had to be an intentional discharge of pollutants. In finding that the overflow of leachate from primary and reserve pumps designed to catch excess runoff is a point source discharge the court found that the combination of sumps, ditches, hoses and pumps as a closed circuit, when it fails because of flaws, the escape of liquid from the confined system is a point source. 599 F.2d at 374.

The Eleventh Circuit held that addition from a point source means that the discharge point causes the pollutants to enter the navigable water being discharged into, and that the pollutants are from "outside" the water being discharged into.

In the C-11 Canal the water in the canal has been contaminated from urban and suburban as well as industrial and agricultural areas in the sub-basins that are collected in the subbasins' canal systems and drain into the C-11 canal. From these areas nutrients and pesticides are introduced into the C-11 Canal, and then "added" into the Everglades. P. B.11; J.A. 116, 127, 133.

The S-9 discharge is definitely altering the water in WCA-3A. J.A. 30-35, 125. The discharged water from S-9 contains pollutants, principally phosphorus, in concentrations not naturally found in the receiving waters. The discharge is causing violations of Florida's water quality standards, both

numeric and narrative.[15] J.A. 33-41; Plaintiff's Complaint Exhibit 2.

In the Everglades, the areas immediately surrounding the S-9, and actually quite a distance surrounding the S-9, is very highly polluted. J.A. 125. From the S-9 pump station looking west into WCA-3A there is a monoculture of cattails. J.A. 38-39. Once the cattail stand dominates the area, it doesn't add oxygen to the water the way the rooted aquatic plants and periphyton and the sawgrass do. The native fish do not survive there, nor can the aquatic bugs that fish feed on be found there... "it's a pretty nasty place." J.A. 38.

## The Discharge From the S-9 Pump Station Into the Everglades Is Not A Nonpoint Source Flow Diversion Facility Under Section 304(f)(2)(F)

The Petitioner Water Management District argues that the S-9 pump station is a nonpoint source discharge because it is a flow diversion facility, under Section 304(f)(2)(F) of the Clean Water Act, 33 U.S.C.§ 1314(f)(2)(F). To determine that the S-9 discharge, which is a point source discharge of pollutants from an outside source, is a nonpoint source under this section of the CWA would be to carve a major new exemption from the definition of a point source discharge. CWA §502(14), 33 U.S.C. § 1362(14).

The language of Section 304(f)(2)(F) is clear. It states, when read in full, that EPA is required to provide information and guidelines for identifying and evaluating nonpoint sources of pollutants, and for procedures to control pollution from nonpoint sources, including: (F) "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the

[15] Under Florida regulation, a violation of any surface water quality criterion constitutes pollution. 62-302.500(e).



construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. 1314(f)(2)(F).

There is no support for the argument that this section is meant to be an exemption for all discharges of pollutants from any dam, levee, channel, causeway, or flow diversion facility from the requirements of §301(a) and §402 of the CWA. By its express terms, Section 304 is an information provision of the CWA.

Within the definition of "point source" is the specific exemption for "agricultural stormwater discharges and return flows from irrigated agriculture. If Congress wanted to exempt all discharges, including point source discharges of pollutants from dams, levees, channels and flow diversion facilities then it could have done so in 1977, when it exempted agricultural stormwater discharges and irrigation return flows from the definition of "point source." CWA §502(14), 33 U.S.C. §1362(14). However, Congress did not.

As the Tenth Circuit Court of Appeals found in *U.S. v. Earth Sciences Inc*, 599 F.2d 368 (10thCir. 1979):

> It contravenes the intent of FWPCA (CWA) and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point. Therefore, we hold that the District Court erred in interpreting 33 U.S.C. §1314(f) as enumerating nonpoint source exemptions from FWPCA regulations. Mining and the other categories listed in §1314(f)(2) may involve discharges from both point and nonpoint sources and those from point sources are subject to regulation.
>
> Id at 373.

Many of the terms in §304(f)(2)(F) are similar in meaning to the terms contained in the definition of point source, which Congress has defined point source as "any discernible, confined and discrete conveyance..." CWA §502(14), 33 U.S.C. §1362(14). The difference between these two provisions is that even a discrete conveyance

would not be a point source unless it is a conveyance "from which pollutants are or may be discharged." CWA §502(14).

In addition, on the face of the Act, the lists in §304(f)(2)(F) cannot be read to mean they are exclusively nonpoint. The construction of dams, levees, channels, causeways or flow diversion facilities has long been recognized as requiring a point source permit because it entails "the discharge of dredged or fill material" within the meaning of CWA §404.

In the present case as the Eleventh Circuit noted, the parties agree that pollutants are being discharged from the S-9, but the S-9 does not create any pollutants. All the parties also agree that the source of much of the pollutants is from upstream urban, suburban, industrial and agricultural stormwater that is being discharged into the C-11 Canal from the three local drainage districts. J.A. 116, 127, 133. The Petitioner acknowledges that the runoff from the C-11 Basin is more polluted than the return seepage from WCA-3, and that phosphorus levels going into WCA-3 will be reduced by decreasing the operation of the larger S-9 pumps with the addition of the smaller S-9a pumps pumping seepage water back. P. B. 17-18.

The collection and drainage system within the C-11 drainage basin comports with the EPA's regulatory definition of "discharge of a pollutant," which *inter-alia* "includes additions of pollutants into waters of the United States from: *surface runoff which is collected or channeled by man;* discharges through *pipes, sewers, or other conveyances* owned by a State, municipality, or other person which *do not lead to a treatment works.*" (Emphasis added). 40 CFR 122.2

There is no provision in the CWA that states that nonpoint sources and point sources are completely separate.



## The Structure of the CWA Point and Nonpoint Source Control: Balance Between Federal and State Responsibilities

The CWA is a paradigm of environmental regulation, and is an accepted exercise of federal power. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 282 (1981).

The Clean Water Act's principal objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. CWA §101(a), 33 U.S.C. §1251(a). In order to achieve this objective, Congress established the national goal that the discharge of pollutants into navigable waters be eliminated by 1985. CWA §101(a)(1), 33 U.S.C. §1251(a)(1). To achieve this objective, Congress made it unlawful to discharge any pollutant, (CWA §301, 33 U.S.C. §1311), through a point source unless in compliance with and NPDES permit under §402 of the CWA, 33 U.S.C. §1342.

Thus, Congress made it a federal requirement that all point source discharges of pollutants are to be governed by §402 of the CWA. A §402 permit requires the establishment and enforcement of technology based limits on individual discharges into navigable waters from point sources. CWA §§301, 304, 33 U.S.C. §§1311, 1314.

Under §402(b) NPDES permitting responsibilities may be shared with the state provided the state meets the requirements of the CWA under §402(b). The states are also required to set water quality standards which are the basis for determining discharge limits under an NPDES permit. EPA retains the right to withdraw the states' authorization to issue NPDES permits; and to veto a specific NPDES permit issued by a state. CWA §402(c), 33 U.S.C. §1342(c).

Florida was recently approved to administer the NPDES program by the Department of Environmental Protection. Fla. Stat. 403.088, under authority of EPA 40 CFR 122. Florida has established specific classifications for

each of its water bodies and water quality standards, at Fla. Admin. Code § 62-302.400.

All states, Florida included, have established water quality standards for the state, which are approved by EPA. CWA §303 (a), 33 U.S.C. § 303(a). 40 CFR Part 131. These water quality standards then form the basis for water quality based permit limitations for individual bodies of water. CWA §303, 33 U.S.C. §1313, 40 CFR §131.2. Section 303(d) requires each state to identify each water body in the state that fails to meet water quality standards, and to review NPDES permits to achieve those water quality standards. 33 U.S.C. §1313(d).

The Act also allows states to impose more stringent water quality controls. CWA §301(b)(1)(C), 33 U.S.C. §1311(b)(1)(C), ( see also CWA §510, 33 U.S.C. §1370); see also 40 CFR §131.4(a)(1993). States are responsible for enforcing water quality standards on intrastate waters. CWA §309(a), 33 U.S.C. §1319(a).

States are also required to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. CWA §401, 33 U.S.C. §1341.

EPA's regulations implementing the CWA require that state water quality standards include "a statewide antidegradation policy" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR §131.12 (1993).

The CWA reserved for the states the responsibility to deal with pollution through nonpoint sources. CWA §101(b), 33 U.S.C. §1251(b). The CWA does not define a nonpoint source, but the EPA and most courts and knowledgeable commentators have defined it as any discharge other than a point source, defined in the CWA §502(14), 33 U.S.C. §1362(14); 35 Santa Clara L. Rev. 1269, 1287-88 (1995). *Consumer Power*, 862 F.2d at 587.

The Petitioner Water Management District alleges that the Eleventh Circuit Decision in this case alters the



traditional federal-state balance of power by requiring that a state "diversion facility" must obtain a NPDES permit. (P.B. 21).

In support of its argument, the Petitioner relies on §101(g), which states that

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing waster resources.
>
> CWA §101(g), 33 .U.S.C. §1251(g).

Section 101(g) is not a prohibitive or limiting provision of the CWA. It does not say that if a state has a water allocation requirement or an established water use right that the Federal government cannot also require compliance with water quality for that discharge. In fact, that is the beauty of §101(g) – it recognizes and supports the dual nature of federal-state roles in water quantity and quality issues.

Sections 101(g) and 510(2) preserve the authority of each state to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. *PUD No.1 of Jefferson County et al. v. Washington Department of Ecology et al.* 511 U.S. 700, 720 (1994). This view is reinforced by the legislative history of the 1977 amendment to the Clean Water Act adding §101(g). (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978). "The requirements [of the

Act] may incidentally affect individual water rights...**It is not the purpose of this amendment to prohibit those incidental effects**. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations." (Emphasis added.) Id at 721.

Section 101(g) of the CWA was enacted in reaction to the 1972 Federal Clean Water Act. It came about mostly as a result of concern by the Western states of the effects of having to obtain a permit under Section 404 of the CWA, whenever a dam or a levee or an irrigation ditch was to be constructed. Hobbs & Raley, *Water Rights Protection and Water Quality Law; the 1977 Clean Water Act: An Exercise in Fundamental Federalism.* Univ. of Colorado Law Review, 1989.

The 101(g) Amendment, enacted with the 1977 Amendments, was the result of the cooperative effort of two prominent Western Senators, Senator Wallop of Wyoming, and Senator Hart of Colorado. The purpose and intent of section 101(g) is to protect state water rights creation and administration from "federal land use planning" while at the same time to allow "legitimate water quality measures" that may have some effect on the method of water usage." Hobbs and Raley, Univ. of Colorado Law Review, vol. 60, 1989 p.852, 853) (123 Cong. Rec. 39,211-212 (1977) (remarks of Sen. Wallop) reprinted in 3 Legislative History of the Clean Water Act, note 27 at 531-32. Id at 854.

## The Eleventh Circuit Decision Facilitates the Traditional Federal-State Balance of Powers

The Eleventh Circuit Decision to require a NPDES permit under CWA §402 for the C-11 discharge into WCA-3A is an excellent example of how point and nonpoint source controls can work together to protect the Nation's waters.

When the District operates the S-9 pump to discharge from the C-11 **into the Everglades**, after the implementation



of the retention and best management practices within the Basin, and the water still contains pollutants, then the point source requirements of the CWA must take over, and the discharge must meet the water quality criteria of the State, at the point of discharge. EPA regulations require that NPDES permits must insure compliance with water quality requirements.[16] See 40 CFR §122.4(a), (d).

## S-9 Permit Under the Everglades Forever Act

The S-9 permit, issued under the Everglades Forever Act, is a nonpoint source permit that requires development of strategies. Fla. Stat. §373.4592(10); J.A. 179 ¶¶ 4, 5. Developing strategies is not achieving compliance. This permit is not a permit to discharge from a point source based on water quality criteria. J.A. 194.

The Everglades Forever Act which Petitioner holds up as the State Water Quality Plan, recognizes that "the best available technology for achieving interim water quality goals" is a combination of Best Management Practices (BMPs) for agriculture and Stormwater Treatment Areas (STAs) to treat and remove the pollutants. Fla. Stat. §373.4592(1)(g). Under the Everglades Forever Act no treatment areas are proposed for the C-11 Basin discharge through the S-9. The S-9 pump station is part of a general permit under the Act, identified as the "Non-ECP" permit, meaning it is one of the many discharges that does not have a commitment for construction of a treatment plant. Fla. Stat.§ 373.4592(9)(k)and(i); See Consolidated Report at 8B-1 to 8B-20.

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[16] Water quality standards are retained as a supplementary basis for effluent limitations, however, so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from fa!ling below acceptable levels.. CWA §§ 301(e), 302, 303, 33 U.S.C.§§ 1311(e), 1312 and 1313. *EPA v. California, ex. rel. State Water Resources Control Bd*, 426 U.S. 200, 205, n.12 (1976).

Subsequent to the filing of the Friend's and the Tribe's lawsuit the State and the Congress have approved the expenditure of over $124 million for the construction of a C-11 impoundment and Stormwater Treatment Area. WRDA 2000 §601(B)(2)(C)(v), 114 Stat. 2682.[17] EPA has required an NPDES permit for all the STAs that have been constructed and are discharging into WCAs 1, 2 and 3 under the Everglades Construction Project approved under the Everglades Forever Act. Fla. Stat. §373.4592(4)(a). EPA issued the first permit to the Water Management District for the discharge from what is now known as STA-1, discharging into the Loxahatchee Refuge (WCA-1) Permit No. SL-107[illegible]52. The State of Florida, after receiving authority to issue NPDES permits from EPA, issued two additional NPDES permits to the Petitioner Water Management District for discharging from two other STAs, STA-2, (NPDES Permit No.FL-01779461, issued Sept. 29, 2000.) and STA-5, Permit No. FL-0177954; and STA-6. An NPDES permit would be required for the proposed STA in the C-11 Basin as well.

The Petitioner Water Management District argues that the requirements of having to obtain an NPDES permit would "wreak havoc," mandating costly, burdensome bureaucratic proceedings to obtain permits, inviting litigation, and exposing agencies to huge penalties, as well as interfere with states' nonpoint source programs. P.B. 4. Everglades Restoration would allegedly suffer. P.B. 5.

The Petitioner Water Management District has been administering the NPDES permits cited above. These permits have not wreaked havoc, they have helped the

[17] In 1996, Congress directed the Corps, in cooperation with the District, to develop a comprehensive Everglades restoration plan. WRDA '96 § 528(b) The Restudy, completed in 1999, recommended the $8 billion Comprehensive Everglades Restoration Plan ("CERP"). CERP calls for numerous structural and operational changes to the C&SF Project in order to restore the quantity, quality, timing and distribution of water. Consolidated Report at 7A-3. P B.17. The new STA is a CERP Project.



District focus on obtaining compliance with the State's water quality standards at the point of discharge from the Everglades Agricultural Area into the Everglades. Now it has to be applied to the urban discharge from Broward County.

The 1972 Amendments of the CWA establish the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations. *EPA v. California State Water Resources Control Board, et al*, 426 U.S. 200, 205 (1975). As this Court stated, the NPDES permit:

> serves to transform generally applicable effluent limitations and other standards – including those based on water quality – into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. §§ 309 and 505, 33 U.S.C. §§ 1319 and 1365.
> Id at 205.

In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the (1972) Amendments. Id. at 205.

The Water Management District argues that since they have adequate nonpoint source control plans to deal with the pollution going into the Everglades, and that the S-9 pump station has a permit under state law, that the discharge from the S-9 should not be required to have a point source discharge permit (NPDES).

The problem with this argument is that a determination of whether a discharge is a point source to be regulated under CWA §402 cannot be based on the adequacy of the state's existing nonpoint program. The existence or nonexistence, the effectiveness or the non-effectiveness, of a state's nonpoint source plan has no relevance in the determination of whether a point source is a "discharge of pollutants" under the CWA. That evaluation is made by applying §301 and the definitions set out in §§ 502(6), (12),

and (14) of the CWA. 33 U.S. C. §§ 1311, 1362(6), (12), and (14).

**Florida's Nonpoint Source Program for the Everglades has been Ineffective and Driven by Lawsuits for Failure to Implement a Sound Restoration**

Petitioner SFWMD has diverse obligations under its enabling provisions. In 1972 the SFWMD became the local sponsor of the C&SF Project. Fla. Stat. §§373.016, 373.1501. P. B. 13. In addition to its duties to provide flood control and water supply to urban and agricultural interests it was given the additional responsibility of environmental protection and restoration. Fla. Stat. §§373.016, 373.1501; P.B. 13. These diverse responsibilities often create conflict which has led to three decades of intense wrangling among competing interests. P.B. 13.

It has been known since as early as 1939 that the Everglades was being severely damaged by reckless drainage, and that comprehensive water resource development, and the reversion of large areas to wetlands by "re-watering." was necessary. De Grove, Central and South Florida Flood Control Project 100-101 (1958) P.B. 7.

Between 1972 and 1988 little was done by Petitioner to stop the continuing degradation of the Everglades from the imposition of the C&SF Project and the discharge from the urban and agricultural areas into the Everglades.

As a result of the severe harm being experienced in the Everglades National Park and the Loxahatchee Refuge (WCA-1). in 1988 the Federal Government brought suit against the SFWMD in Federal Court for violating its commitment to bring clean water to these areas of the Everglades. *US v. SFWMD* No. 88-1886 (S.D. Fla.) This action resulted in a Settlement Agreement and eventual Consent Decree between the U.S. Department of Interior and the Petitioner, SFWMD in 1992. *Id.* As a result of that lawsuit, the programs laid out in the Everglades Protection



Act of 1991, resulting in the Water Management District's SWIM Plan of 1992 were begun.

Since that 1988 Lawsuit was filed the State Legislature passed two laws to try to deal with the deteriorating conditions in the Everglades. The first was in 1991, the "Marjory Stoneman Douglas Everglades Protection Act," Fla. Laws Ch 91-80; Fla.Stat. § 373.4592 (1991). Fla. Stat. §373.4592(g); J.A. 181-183. The Act identified the three Water Conservation areas, including WCA-3A, as part of the Everglades areas that needed protection and restoration, along with the Everglades National Park and the Florida Bay. The Act referred to these areas as the Everglades Protection Areas.

The 1993 Statement of Principles resulted from another lawsuit filed mostly by sugar cane growers, which challenged the 1991 Settlement Agreement from the 1988 lawsuit which was filed in Federal District Court in 1992. (P.B. 15).

The Statement of Principles then evolved into the Everglades Forever Act of 1994, Fla. Stat.§ 373.4592. P.B.15. To deal with the water quality problems identified in the Act the BMP set up a voluntary phosphorous reduction plan for the farms in the EAA, Fla. Stat. §373.4592, and established the creation of six large treatment marshes on the southern rim of the EAA to treat the water for phosphorous before being discharged into the Everglades WCAs. Burns & McDonnell, Everglades Protection Project Conceptual Design ES-2 (1994). (P.B.15). Each of these created marshes, called Stormwater Treatment Areas (STAs) by the Everglades Forever Act, was required to obtain a NPDES permit before discharging into the Everglades Fla. Stat. §373.4592(4)(a).

Also in the Everglades Forever Act, the legislature in effect suspended all water quality standards in the Everglades for a period of 12 years, in order to allow the Water Management District time to develop a numeric

standard for phosphorus. Fla. Stat. § 373.4592(4)(f)(3) [18] [19] That Act was recently amended by the Florida legislature to extend the suspension of water quality standards in the Everglades for at least another 10 years, until the year 2016. 373.4592 (2003)(3)(e).

The Everglades Forever Act also failed to include any means to treat discharge of polluted waters from the urban areas including the major discharge through the S-9 from Broward County into the Everglades. That is why the Friends of the Everglades and the Tribe brought this lawsuit against the Water Management District.

## Section 402 Is not Limited to Permitting Industrial and Municipal Waste Streams

Petitioner Water District suggests that the definition of "pollutants" is itself a broad exemption provision, limiting the CWA's emphasis to "industrial and municipal" wastes. P. B. 28, 29. This assertion is specifically contradicted by the definition within the CWA of the term "pollutant." The definition, at CWA §502(6), states: "The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

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[18] Both the Friends of the Everglades and the Tribe challenged this provision in lengthy litigation in both the District Court of Southern Florida and the Eleventh Circuit Court of Appeals. The litigation resulted in the Eleventh Circuit and subsequently the District Court determining that the statutory provision Fla.Stat.§ 373.4592(4)(f)(3) was a change in water quality standards by suspending those standards for a period of 12 years. *Miccosukee Tribe v. United States*, 1998 WL 1805539.

[19] When Marjory Stoneman Douglas learned that the Everglades Forever Act was going to suspend all water quality standards in the Everglades for at least 12 years, she and the Friends of the Everglades asked the State Legislature to remove her name from the act.



Section 502(14), which defines "point source," does not restrict the definition to industrial or municipal point sources, and, the definition of "discharge of pollutant" includes "any addition of any pollutant to any navigable waters from any point source," without a limitation to industrial or municipal discharges.

## THE SOLICITOR GENERAL'S BRIEF

There is no way to reconcile the Solicitor General's Amicus Opinion with the CWA. The Solicitor General argues that any discharge from any navigable water to another is not a discharge of a pollutant.

The Solicitor General's opinion is based on the conclusion that, under the CWA, all navigable water bodies are the same, each is part of one entity identified as the Nation's navigable waters. Therefore, there is no discharge of pollutants from one water to another since the polluted water is already in navigable waters. Since there is no "discharge," the discharge between two navigable waters is a nonpoint source, and therefore the NPDES permit requirements of §402 do not apply.

The concept that all of our Nation's waters are the same from a water quality standpoint is unsupportable. The harm that results from treating all navigable waters as the same is clear when looking at impact of the polluted discharge from the C-11 stormwater Basin is causing when it is discharged into WCA-3A. One witness described it as a "monoculture of cattails" The native fish do not survive there, nor can the aquatic bugs that fish feed on be found there. J.A. 38-39.

The Solicitor General's Opinion would radically change the CWA distinction that a §402 permit must be obtained before a discharge can occur from <u>any</u> point source to navigable waters. This interpretation is contrary to this Court's determination that "Every point source discharge is prohibited unless covered by a permit, which directly

subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee v. Illinois* 451 U.S. 304, 318. (1975).

This "apparatus" includes the requirement that states establish water quality standards that must be specific to particular bodies of water, and must assign "designated uses" and water quality criteria for each water body, CWA §303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), and the basic protection of the NPDES permit to require compliance with water quality criteria at "the point where the discharge stream enters the waters of the United States." SG B.6; CWA §402, 33 U.S.C. §1342.

The SG opinion contravenes the fundamental overriding purpose of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA §101(a), 33 U.S.C. § 1251(a).

There is no question that the CWA reserves for the states the authority to move waters within the states for water allocation purposes or for compliance with state laws governing water use rights. CWA §304(f)(2)(F), 33 U.S.C. §1314(f)(2)(f). It is where the movement of that water becomes a discharge through a point source that adds pollutants from an outside source that causes the imposition of a §402 permit.

It is a "discharge" of a pollutant that distinguishes a point source from a nonpoint source. CWA §502(14) defines a point source as "any …discrete conveyance…from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Even a discrete conveyance is not a point source if there is no discharge of one of the pollutants listed within CWA §502(6), 33 U.S.C. §1362(6). A nonpoint source is understood as any source of pollution that cannot be traced to a point source. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156,164 (1982).

These basic tenets of the CWA are maintained under the Eleventh Circuit decision. They are undermined by the arguments of the Petitioner and the Solicitor General.



The Solicitor General suggests that since Congress has stepped in and developed the restoration through the CERP, that an NPDES permit is not necessary. SG. B. at 28. This argument ignores the fact that a legislative determination of the need for an NPDES permit is made under the CWA, §§301, 402 and 502(12) and (14); not on whether there is an effective nonpoint source control plan in effect.

Further, the water flow restoration of the CERP Plan is based on the assumption that the Florida DEP will be meeting water quality and permit standards by 2006. §601(b)(2)(a)(II)(ii), 114 Stat. 2681. However, the Florida legislature recently amended the water quality compliance statute, the Everglades Forever Act, to extend the suspension of water quality standards in the Everglades for at least another 10 years, until the year 2016. Fla. Stat. §373.4592(3)(e), (2003).

## IMPACT OF ELEVENTH CIRCUIT DECISION

The Eleventh Circuit Decision does not impact on many of the Amicus concerns. The Decision does not conflict with the EPA exemption for dam-caused pollution within a single water body. If there are inter-basin transfers, as the Commonwealth of Pennsylvania Amicus Brief clearly establishes, an NPDES permit will not "wreak havoc," either on dischargers or the state. Instead, it will protect our Nation's waters when discharges from one navigable body of water to another adds pollutants that could cause harm.

## CONCLUSION

The Judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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(39)

No. 02-626

# In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF

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## TABLE OF CONTENTS

REPLY BRIEF ..... 1

1. By its plain language Section 402 does not apply to water diversions ..... 2
2. Though the S-9 is a "point source," it adds nothing to navigable waters ..... 3
3. Opposing amici's reference to ground water movement is a red herring ..... 4
4. The District's position is fully consistent with other elements of the statutory and regulatory scheme ..... 5
5. The District's position is fully consistent with CWA Section 401 ..... 7
6. Respondents grossly exaggerate the effect of the District's position on the scope of Section 402 regulation ..... 9
7. There exist ample mechanisms to address the diversion of polluted waters ..... 10
8. Requiring NPDES for water diversions is wholly unnecessary and enormously disruptive ..... 12

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Alabama Rivers Alliance* v. *FERC*, 325 F.3d 290 (D.C. Cir. 2003) ..... 8

*Arizona* v. *California*, 373 U.S. 546 (1963) ..... 5

*Arkansas v. Oklahoma*, 503 U.S. 91 (1992) ..... 13

*Auer* v. *Robbins*, 519 U.S. 452 (1997) ..... 1

*Chickasaw Nation* v. *United States*, 534 U.S. 84 (2001) ..... 8

*Committee to Save the Mokelumne River* v. *East Bay Mun. Util. Dist.*, 13 F.3d 305 (9th Cir. 1993) ..... 9

*Del-Aware Unlimited, Inc.* v. *Pennsylvania*, 508 A.2d 348 (1986) ..... 12

*Dubois* v. *United States Dep't of Ag.*, 102 F.3d 1273 (1st Cir. 2001) ..... 9

*Escondido Mut. Water Co.* v. *La Jolla Indians*, 466 U.S. 765 (1984), aff'g in part 692 F.2d 1223 (9th Cir. 1983) ..... 5

*Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) ..... 8

*International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987) ..... 10

*National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) ..... 2, 3

*National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... 1, 2, 3, 14

*Northern Plains Res. Council* v. *Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir.), cert. denied, 124 S. Ct. 434 (2003) ..... 9

*Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002) ..... 10, 11



## TABLE OF AUTHORITIES-Continued

**Page**

*PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994) ..... 8, 13, 14

*Sierra Club* v. *Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980) ..... 9

*Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ..... 14

*United States* v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1980) ..... 9

*United States* v. *Ohio*, 503 U.S. 607 (1992) ..... 13

*United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... 2

**Statutes and Regulations:**

33 U.S.C. § 1251 ..... 13, 14

33 U.S.C. § 1253 ..... 11

33 U.S.C. § 1270 ..... 11

33 U.S.C. § 1288 ..... 11

33 U.S.C. § 1311 ..... 6, 14

33 U.S.C. § 1312 ..... 7

33 U.S.C. § 1313 ..... 7

33 U.S.C. § 1314 ..... 2, 3, 4, 14

33 U.S.C. § 1321 ..... 8

33 U.S.C. § 1341 ..... 7, 11

33 U.S.C. § 1342 ..... *passim*

33 U.S.C. § 1344 ..... 7, 11

**TABLE OF AUTHORITIES-Continued**


**Page**

33 U.S.C. § 1362 ..... 2, 6, 8, 9

33 U.S.C. § 1377 ..... 11

40 C.F.R. § 121.1 ..... 7

40 C.F.R. § 122.21(j) ..... 6

40 C.F.R. § 122.26(b)(9) ..... 1, 3, 5

40 C.F.R. § 130.0(b) ..... 7

40 C.F.R. § 130.2(j) ..... 7

40 C.F.R. § 130.3 ..... 7

40 C.F.R. § 130.7 ..... 7

40 C.F.R. § 131.10 ..... 7, 10

40 C.F.R. § 131.12 ..... 7

N.Y. Envtl. Conserv. Law § 17-0501 ..... 12


**Miscellaneous:**


THE CLEAN WATER ACT HANDBOOK (M. Ryan ed. 2003) ..... 6, 10, 12, 13

H.R. Rep. No. 92-911 (1971), reprinted in 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT OF 1972, Ser. No. 93-1 ..... 3

Harry Hughes & Thomas Burke, *The Cleanup of the Chesapeake Bay*, 11 NAT. RESOURCES & ENV'T 30 (Fall 1996) ..... 11

S. Rep. No. 95-370 (1977), reprinted in 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, Ser. No. 95-14 ..... 14

David McCally, THE EVERGLADES: AN ENVIRONMENTAL HISTORY (1999) ..... 4, 5




**TABLE OF AUTHORITIES-Continued**


**Page**

United States Environmental Protection Agency, *NPDES Permit Writers' Manual* ..... 14

United States Environmental Protection Agency, Office of Inspector General, *EPA Should Take Further Steps to Address Funding Shortfalls and Time Slippages in Permit Compliance System Modernization Effort*, Report No. 2003-M-00014 (May 20, 2003) ..... 15

## REPLY BRIEF

Our opening brief demonstrated that the plain language, structure, and history of the Clean Water Act, confirmed by basic principles of statutory interpretation, establish that the District does not have to obtain an NPDES permit to operate its S-9 pump. Like hundreds of thousands of other publicly owned water diversion facilities around the country serving critical flood control and water allocation needs, the S-9 pump *moves* navigable waters along with pre-existing pollution, but it does not *add* new pollutants to those waters. Because the S-9 pump is not the source or origin of an "addition" of any pollutant to the navigable waters—an especially absurd idea here, where manmade sub-basins across which the pump transports waters have not changed the unitary nature of South Florida's water system (J.A. 68) —the pump does not result in a "discharge of pollutants" requiring an NPDES permit.

The United States agrees that this is the correct reading and application of the statutory language, as EPA has consistently done since passage of the CWA by permitting practice, in regulations, and in litigation. EPA has not in the past 30 years required NPDES permits for facilities that transport or convey navigable waters, including the S-9 pump that the Army Corps constructed and now oversees. EPA regulations expressly distinguish between a point source that introduces pollutants to navigable waters (which requires an NPDES permit) and one that conveys polluted navigable waters (which does not). See 40 C.F.R. § 122.26(b)(9) (excluding from the definition of a municipal storm water "outfall" to navigable waters "conveyances which connect * * * waters of the United States and are used to convey waters of the United States"). And EPA's litigating position is "in no sense a '*post hoc* rationalization'" but a long held and frequently reiterated view "reflect[ing] the agency's fair and considered judgment." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); *e.g.*, *Gorsuch*, 693 F.2d at 165, 167 (EPA's interpretation "was made contemporaneously with the

passage of the Act, and has been consistently adhered to since").

Respondents would vastly expand the Section 402 federal permitting requirement to reach, for the first time, huge numbers of facilities that divert water for beneficial purposes and that have been regulated for decades through State water quality programs. Their arguments for this shift of authority away from the States are meritless. None provides any reason to depart from Congress's clear intent that diversions of navigable waters like S-9 not be subjected to federal NPDES permitting.

**1. By its plain language Section 402 does not apply to water diversions.** Respondents attribute to the District an argument it does not make. We do not contend that, to fall under Section 402, a point source must itself generate the pollutants that it adds to navigable waters. That is not the meaning of the statutory language and would gut the NPDES, since point sources typically convey rather than create pollutants.

What the definition of a "discharge of pollutants" subject to Section 402 does require, however, is that there be an "addition" of a pollutant "from" a point source "to navigable waters." CWA § 502(12). As we have explained (Br. 26-27) and the United States agrees (U.S. Br. 15-20), that language plainly indicates that for Section 402 to apply a point source must be the origin or source of the initial entry of the pollutant into navigable waters. Congress's goal was to control pollutants "at the source" (*Riverside Bayview*, 474 U.S. at 133), not to require federal permitting of every diversion through which polluted water passes. See CWA § 304(f)(2)(F). As we and the United States agree (Pet. Br. 27; U.S. Br. 16-17), and as the courts of appeals affirmed in *Gorsuch* and *Consumers Power*, an "addition" of pollutants to navigable waters from a point source "occurs only if the point source itself physically introduces a pollutant into water *from the outside world*"—not when "polluted water * * * passes through the [point source] from one body of navigable



water * * * to another." *Gorsuch*, 693 F.2d at 175 (emphasis added); *Consumers Power*, 862 F.2d at 586 ("To the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention" not to require NPDES permitting).

**2. Though the S-9 is a "point source," it adds nothing to navigable waters.** Respondents offer no plausible alternative explanation of the statutory language. They make much of the fact that the S-9 fits the description of a "point source." Tribe Br. 19-21. But that is just the beginning of inquiry. A point source needs an NPDES permit only if it adds pollutants to navigable waters, which the S-9 does not. There is therefore nothing odd about pipes, pumps, sluice gates, or similar diversions that fit the physical description of point sources being subject only to nonpoint regulation. See *Consumers Power*, 862 F.2d at 583-584, 588 (it is "circular" to contend that "'point source' may not be defined independently of 'addition'"; "water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category"); 40 C.F.R. § 122.26(b)(9) (point sources connecting navigable waters not subject to NPDES).

We do *not* rely on a statutory "exemption" from NPDES regulation. Tribe Br. 21-22, 27-30. Because the S-9 is not the source of an addition of pollutants, it does not fall within the scope of Section 402 to begin with. Section 304(f)(2)(F) is not an "exemption" but a pellucid confirmation of Congress's understanding that "pollution resulting from" flow diversions belong in the nonpoint source category of regulation because they involve no "discharge of pollutants." That intent is underlined by the plainest of legislative history. See H.R. Rep. No. 92-911, 1972 LEG. HIST. at 796 ("Section 304[f] addresses the problem of nonpoint sources of pollutants [such as] manmade changes in the normal flow of surface and ground waters"). Virtually all methods of changing the "movement, flow, or circulation" of waters involve the use of "discernable, confined, discrete conveyances." But Congress

understood that those point sources do not "add" pollutants to navigable waters "from" the facility. Section 304(f)(2)(F) would be meaningless if, as respondents contend, flow diversion through a point source remained subject to NPDES. Tribe Br. 27-28; Browner Br. 11-12.

**3. Opposing amici's reference to groundwater movement is a red herring.** It is also important to understand, and for this Court to make clear, that no Section 402 discharge occurred even if the S-9 pumps, in conveying the navigable waters of the C-11 canal into the WCA-3, moved some ground water with it. See Florida Wildlife Fed'n Br. 16-18. Congress in Section 304(f)(2)(F) manifested its understanding that changing the flow or circulation of "navigable waters *or ground waters*" in a way that results in "pollution" does not involve discharges regulated under Section 402 but is subject to nonpoint source regulation. That any induction of ground waters by the S-9 pump would not introduce pollutants from "the outside world" into navigable waters is particularly obvious. In the Everglades region, as the Tribe's expert conceded, there is no meaningful distinction between ground and surface waters. J.A. 117, 119 ("We have a problem when we talk about ground water in the Everglades. Ground and surface waters are essentially the same thing. * * * [I]t's an unconfined aquifer"; "water flows surficially and through the ground water. We have a * * * porous type of situation"); see, *e.g.*, David McCally, THE EVERGLADES: AN ENVIRONMENTAL HISTORY 9 (1999) (this is a "hydrologic system where surface water and groundwater [are] one"). Accordingly, diversions of surface water in South Florida often also move groundwater. Indeed, most significant water diversions, wherever located, result in changes in the relationship between surface and ground water.[1]

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[1] There is no question that the S-9 pump is a "flow diversion facility." *Cf.* Tribe Br. 28-29. It changes the "movement" and "flow" of the waters of the C-11 canal, as the canal is now engineered, by diverting the C-11's waters across the levee into the WCA-3. It thereby replicates the natural flow of water before the C&SF Project, keeping the Everglades supplied with water critical for their survival. See McCally, *supra*, at 8 (noting the "generally westerly direction of drainage" in the Everglades); J.A. 66 (Tribe's expert testified that maintaining water levels in the WCA-3 is necessary for "the long run * * * restoration of the remaining Everglades"). This Court recognizes that water "diversions" take many different forms. *Escondido Mut. Water Co.* v. *La Jolla Indians*, 466 U.S. 765, 768 (1984), aff'g in part 692 F.2d 1223, 1226 (9th Cir. 1982); *Arizona* v. *California*, 373 U.S. 546, 553-564 (1963).



**4. The District's position is fully consistent with other elements of the statutory and regulatory scheme.** Respondents and their amici assert that there are inconsistencies between recognizing that water diversion facilities like the S-9 do not require NPDES permits because they do not "discharge" pollutants to navigable waters and other federal permit requirements under the CWA. The circumstances they point to in which permits are required are readily distinguishable. All involve the obvious introduction of pollutants from point sources to navigable waters and hence involve "discharges," not mere water diversions.

*Municipal separate stormwater system permits.* The C-11 canal does not require an NPDES permit under CWA Section 402(p) as a municipal separate stormwater system ("MS4") discharging to navigable waters. See Tribe Br. 22-24 & n.12; Florida Wildlife Fed'n Br. 19-21. Even if the C-11 were part of an MS4 (which respondents did not assert below and which we do not address), applicable EPA regulations recognize that "municipal separate storm sewer discharges to waters of the United States" do *not* include "pipes, tunnels or other conveyances" like the S-9 "which connect * * * waters of the United States and are used to convey waters of the United States." 40 C.F.R. § 122.26(b)(9).

*Publicly owned treatment works.* Publicly owned treatment works ("POTWs") treat domestic and industrial waste-

water, including sanitary sewage, often discharging treated water into navigable waters while otherwise disposing of remaining sewage sludge. See 33 U.S.C. § 1311(b)(1)(B); 40 C.F.R. § 122.21(j). POTWs *always* do "more than" pass polluted nonpoint source runoff to navigable waters (*Cf.* Tribe Br. 22; Browner Br. 7); sewers collecting only runoff are covered by the MS4 rules discussed above. POTWs by definition collect sanitary and other wastewater from domestic and industrial sewage pipes and then treat it, utterly transforming it before disposal. See THE CLEAN WATER ACT HANDBOOK 69-81 (M. Ryan ed. 2003). It is not remotely relevant to the issues in this case that POTWs require NPDES permits when they collect, treat, and then discharge treated sanitary sewage to navigable waters.

*Irrigation return flows.* Respondents and their amici rely on a 1975 EPA General Counsel opinion that irrigation return flows from agriculture may result in a discharge even if they are treated as navigable waters. Tribe Br. 31; Browner Br. 17-19. But Congress disapproved that analysis in 1977, specifically providing that irrigation return flows from agriculture involve no discharge requiring federal permits. CWA § 502(14). In any event, when water is used to irrigate crops it loses its character as "navigable waters" (see U.S. Br. 23) and may pick up new pollutants from fertilizers, pesticides, and other sources. Its subsequent release into navigable waters through a point source would logically qualify as an "addition" of pollutants absent Section 502(14). That is in no way inconsistent with recognizing that diverting navigable waters containing pollution involves no discharge.

*State Water Quality Standards and Total Maximum Daily Loads for water bodies and segments.* Recognizing that Section 402 permits are required only when pollutants are first added to navigable waters from a point source is consistent with requirements elsewhere in the CWA and its implementing regulations that apply to distinct water bodies or segments of navigable waters. *Cf.* N.Y. State Br. 10-14. States establish water quality standards ("WQS") for "a



specific portion of the navigable waters." 33 U.S.C. § 1312(a) (providing for water quality based effluent limitations on point source discharges when necessary to attain "water quality in a specific portion of the navigable waters"); see also, *e.g.*, *id.* § 1313(d)(1)(B) (requiring States to identify "waters or parts thereof" for which certain controls are insufficiently protective). As EPA regulations explain, "[w]ater quality standards * * * are the State's goals for individual water bodies." 40 C.F.R. § 130.0(b); see also, *e.g.*, *id.* §§ 130.2(j), 130.7 (States to identify "water quality limited segments" of water bodies requiring Total Maximum Daily Loads ("TMDLs")); *id.* § 130.3 (a WQS "defines the water quality goals of a water body, or portion thereof"); *id.* §§ 131.10, .12 (State water use designations and anti-degradation obligations apply to each "water body"). The intricate statutory and regulatory scheme requiring States to establish WQSs and TMDLs for *portions* of the navigable waters would be unaffected by a ruling that flow diversions of navigable waters are not subject to NPDES permitting.

*Dredged and fill material permits.* Contrary to respondents' assertion (Tribe Br. 32 n.15; NWF Br. 13-15), Section 404's permit requirements are not pertinent. Section 404 creates a separate permitting scheme, administered by a separate agency, for discharges of dredged or fill material into navigable waters at specified disposal sites. This case does not involve depositing dredged or fill material into navigable waters or any activity remotely akin to dredging or filling. See U.S. Br. 22 n.7. Nor does it involve any redeposit into navigable waters of dredged spoil.

**5. The District's position is fully consistent with CWA Section 401.** Section 401(a) of the CWA provides that an applicant for *any* federal license or permit for an activity "which *may* result in *any discharge* into the navigable waters" must obtain a State water quality certification. 33 U.S.C. § 1341(a)(1) (emphasis added); see 40 C.F.R. § 121.1. Amicus National Wildlife Federation points out (at 7) that the term "discharge" in CWA Section 401(a) may encompass

moving navigable waters through power generating turbines licensed by FERC. See *PUD No. 1*, 511 U.S. at 711; *Alabama Rivers Alliance* v. *FERC*, 325 F.3d 290, 297 (D.C. Cir. 2003). That it does so, however, casts no doubt on our argument concerning the scope of Section 402.

On its face Section 401 is more expansive than Section 402. Congress used in Section 401 the term "discharge" rather than "discharge of a pollutant." And Congress defined "[t]he term 'discharge' when used without qualification" to "*includ[e]* a discharge of a pollutant"—clearly indicating that "discharge" covers *more than* the "addition" of pollutants to navigable waters "from" a "point source." Section 502(16) (emphasis added); see *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001) ("including" introduces an "illustrative list" without "any suggestion that Congress intended [it] to be complete"); see also *PUD No. 1*, 511 U.S. at 725 ("The term 'discharge' [in Section 401(a)] is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted'") (Thomas, J., dissenting); CWA § 311 (regulating "discharges" of oil and hazardous substances).

Because Congress did not qualify the term "discharge" in Section 401(a) to require an addition from a point source, ruling that the S-9 results in no such addition will leave States' Section 401 certification authority intact. Indeed, when the Corps recently constructed the S-9A pumps to return seepage to the WCA-3 from the C-11 basin (see Pet. Br. 17), it properly sought a Section 401 certification. Of course, even where Section 401 is inapplicable, a State may regulate under State law to achieve its water quality standards. The S-9, built before passage of Section 401, is permitted under Florida law to ensure compliance with State water quality standards. See Pet. Br. 17.



**6. Respondents grossly exaggerate the effect of the District's position on the scope of Section 402 regulation.** It is not true that activities involving *more* than the transfer of waters containing pollution will escape NPDES regulation on our reading of Section 402. *Cf.* Tribe Br. 25; N.Y. State Br. 19-21. As the United States points out (at 23-24), an activity may cause navigable waters to cease to be such, so that an "addition" may occur if the water is subsequently added back to navigable waters and the other elements of Section 402 are satisfied. That inquiry "depend[s] on the facts of the particular case"—though it is clear that no such change in the character of the water occurs when the S-9 simply pumps it a number of feet through a levee, or as a result of most water diversions. U.S. Br. 24.

For example, removing water to facilitate mineral extraction or pumping it through snowmaking equipment may transform the water into "industrial waste," a defined pollutant. *Cf. Northern Plains Res. Council* v. *Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003); *Dubois*; CWA § 502(6). An impoundment created to capture toxic acid mine drainage "and to contain and evaporate the water through a ponding and recirculation system" is a waste treatment facility, not a navigable water. *Committee to Save the Mokelumne River* v. *East Bay Mun. Util. Dist.*, 13 F.3d 305, 307 (9th Cir. 1993). Impoundments that capture and treat polluted discharges are no more "navigable waters" than are agricultural lagoons created to contain and treat animal wastes. "Conveyances * * * which constitute a component of a mine drainage system" (*Sierra Club* v. *Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980)) and overflow from "a closed circulating system to serve the gold extraction process" (*United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979)) similarly do not look like diversions of navigable waters. *Cf.* Browner Br. 13. It takes a vivid imagination—and ignoring EPA's discretion—to get from the narrow proposition that "changes in the movement, flow, or circulation of any navigable waters or ground waters" by

"flow diversion facilities" do not result in a "discharge of pollutants" to the conclusion that decisions like these will be upset. *Ibid.*

**7. There exist ample mechanisms to address the diversion of polluted waters.** Respondents and their amici contend that not subjecting water diversions to NPDES permitting has adverse consequences for the environment. The parade of horribles they trot out is purely imaginary.

The suggestion that unless NPDES applies to water diversions downstream States will be "powerless" in the face of pollution from upstream neighbors is frankly ridiculous. N.Y. State Br. 16. In fact, with regard to the *NPDES program*, downstream States stand in "a subordinate position to source States" with only "an advisory role." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490-491 (1987). In contrast, EPA regulations require that in establishing water quality standards for a water body, "the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b). A State must therefore respect the water quality standards of downstream and adjacent jurisdictions. In addition to CWA actions to enforce this requirement by EPA *or* affected States *or* citizens, those who dump pollution on downstream neighbors are also potentially subject to nuisance and other state law suits. See *Ouellette*, 479 U.S. at 498 (an affected downstream State may sue for violation of the upstream State's laws, including its "nuisance law"). Furthermore, if a State fails to establish and implement TMDLs, EPA may deny that State CWA grant money. *Pronsolino*, 291 F.3d at 1140. See also Ryan, CLEAN WATER ACT HANDBOOK 209-210.

The CWA contains numerous other mechanisms to deal with externalities. For example, EPA is charged to encourage "cooperative activities by the States," including "compacts" to further "prevention and control of pollution," and many



States are party to such compacts. 33 U.S.C. § 1253. EPA mediates "differing water quality standards that may be set by States and Indian tribes located on common bodies of water." *Id.* § 1377(e). And the Act provides that certain water quality problems spanning more than one State are to be managed by "a single representative organization." *Id.* § 1288(a)(3). Multistate approaches to protecting shared water resources are the norm. See, *e.g.*, Harry Hughes & Thomas Burke, *The Cleanup of the Chesapeake Bay*, 11 NAT. RES. & ENV'T 30 (Fall 1996) (describing the Maryland, Virginia, Pennsylvania, District of Columbia, and EPA Chesapeake Bay Agreement); 33 U.S.C. § 1270 (establishing the multi-State and multi-agency Lake Champlain Management Conference); http://www.epa.gov/glnpo/gls/gls01.html (multi-State and -agency Great Lakes Strategy).

To address *intra*state pollution a State need only establish and implement appropriate water quality standards and TMDLs. The notion, repeated in a number of the opposing briefs, that a State would be powerless to stop the pumping of saltwater into a freshwater river if diversions of navigable waters lie outside Section 402 is absurd. The introduction of saltwater would violate State water quality standards and TMDLs and the State could prohibit that activity under State law. If the activity required a federal permit of any kind—for example a Section 404 permit for construction of the pump—the State could deny Section 401 certification. If a State permits saltwater to be diverted into freshwater or heavily polluted water to be diverted into pristine water it has only itself to blame; it has all the regulatory tools necessary to prevent this from occurring. Just as a State may impose onerous land use restrictions and best management practices on forestry operations within a polluted watershed to achieve its TMDLs (see *Pronsolino*, 291 F.3d at 1129-30), so it may choose to subject water diversions to rigorous nonpoint source regulation to prevent pollution reaching any segment of its navigable waters (including effluent or other discharge limitations, see Pet. Br. 36 n.7). In light of the panoply of

State powers over nonpoint source pollution reserved to the States under the CWA and existing under State law, it is extraordinary that New York State would complain to this Court (at 20-21) that only through NPDES can it address New York City's diversion of reservoir water into a trout stream to supply the City with drinking water. New York State clearly does not need to rely on Section 402 to deal with that issue. See N.Y. Envtl. Conserv. Law § 17-0501.[2]

**8. Requiring NPDES for water diversions is wholly unnecessary and enormously disruptive.** While the perils respondents purport to see are insubstantial, the adverse consequences of requiring facilities like the S-9 to obtain NPDES permits are not. The United States has explained (at 28) that Congress designed the NPDES program to address "distinctly different issues" from those raised by public transfers of waters polluted by a multitude of upstream sources, and that applying NPDES where it does not belong would "misdirect governmental resources" to "unnecessary

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[2] Minnesota cities that discharge pollutants from a POTW to the Mississippi river are concerned about a State administrative rule that imposes more stringent phosphorus discharge limits where the discharge "affects a lake or reservoir," a State law issue that has nothing to do with the proper scope of Section 402. Pennsylvania apparently applies its NPDES permitting program to interbasin water diversions—based on a one paragraph ruling of the Commonwealth Court of Pennsylvania, devoid of analysis, that interbasin transfers result in an "addition." *Del-Aware Unlimited, Inc.* v. *Pennsylvania*, 508 A.2d 348, 359 (1986). Of course, Pennsylvania could follow its "Policy for Permitting Surface Water Diversion" regardless whether CWA Section 402 requires it. In fact, as Pennsylvania admits (at 15), that policy strays well beyond the NPDES program by addressing adverse impacts of water diversions with "Best Management Practices" other than "technology-based effluent limitations"—a core State law strategy for addressing nonpoint source pollution but not something generally associated with the federal NPDES program. See Ryan, CLEAN WATER ACT HANDBOOK 16-32.



and duplicative" ends and "hinder" the Everglades restoration project to which the Nation has committed $8 billion. A host of state and local water management agencies and their national organizations, numerous States, and state and municipal government organizations such as the National League of Cities, U.S. Conference of Mayors, and Council of State Governments have explained that imposition on NPDES permitting on hundreds of thousands of such transfers would be impractical, wasteful, hugely disruptive of the Nation's intricate system of water allocation and control, and entirely otiose in light of nonpoint source programs and powers that address pollution in diverted waters.

Respondents denigrate our federalism concerns. But extending NPDES to the traditionally local water management activity of moving water across levees fundamentally shifts the federal/state balance achieved in the CWA through "distinct roles for the Federal and State Governments." *PUD No. 1*, 511 U.S. at 704. It is little comfort that many States "administer" NPDES permits. NPDES permits are federally mandated where they apply; the error of the Court below was to impose this federal mandate where it does not belong. And States administering NPDES permits must "compl[y] with detailed [federal] statutory and regulatory requirements." *United States* v. *Ohio*, 503 U.S. 607, 633 (1992) (White, J., dissenting in part); see *id.* at 634 ("Even when a State obtains approval to administer its permitting system, the Federal Government maintains an extraordinary level of involvement"); *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (distinguishing state and federal roles under the CWA); Ryan, CLEAN WATER ACT HANDBOOK 202 ("The control of nonpoint source pollution is a study in classic federalism").

Congress carefully drew distinctions to preserve and protect the primacy of States' rights and responsibilities to "plan the development and use * * * of land and water resources" and so as not to impair allocations by States of their waters. 33 U.S.C. § 1251(b), (g); see U.S. Br. 3, 25 & n.11. The significant burdens that come with federalizing

traditionally local water management are not to be taken lightly, but should be imposed only on the basis of a clear statement from Congress—which is nowhere to be found. See *SWANCC*, 531 U.S. at 175; CWA § 304(f)(2)(F).[3]

Respondents dismiss the reality that NPDES is an onerous, time- and resource-consuming program designed for different types of facilities than water diversions. See J.A. 146; U.S. EPA, *NPDES Permit Writers' Manual*. Permits are designed for scientific analysis of effluent impacts and the study of end-of-pipe technologies to reduce them—aimed at reaching the lowest level of discharge technologically feasible. See 33 U.S.C. § 1311(b)(1)(A)-(C). It is far-fetched to suppose that the District can control through technology applied at the S-9 the unpredictable presence and levels of pollutants introduced by countless others throughout hundreds of square miles of waters in the C-11 basin. See National League of Cities Br. 20-22. Nor would it be beneficial to try, given that the pollution is *better* addressed at its source through watershed planning and the panoply of state nonpoint source powers, which aim to reduce pollution *before* it reaches the C-11 canal. See U.S. Br. 27.

Respondents also ignore the impact that adding huge numbers of water management facilities nationwide to the

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[3] Unlike the *individual user's* water rights at issue in *PUD No. 1*, the S-9 is part of the *State's* system to store and distribute water for multiple public purposes. Pet. Br. 11-12. Congress made clear, this Court has observed, that its goal in Section 101(g) was not to "prohibit * * * incidental effects" on "individual water rights" but to "insure that State allocation systems are not subverted" by overly aggressive interpretations of the Act. *PUD No. 1*, 511 U.S. at 721, quoting 1977 LEG. HIST. at 532. Section 101(g) is a "specific indication" that Congress did not want to "interfere any more than necessary with state water management" (*Gorsuch*, 693 F.2d at 178) and thus militates strongly against stretching Section 402 to reach diversions like S-9 that are an integral component of the State's water management system.



NPDES will have upon a backlogged and over-budget program that must reissue every NPDES permit every five years. See EPA Office of Inspector General, *EPA Should Take Further Steps to Address Funding Shortfalls and Time Slippages in Permit Compliance System Modernization Effort*, No. 2003-M-00014 (May 20, 2003). It is no exaggeration to suggest that the system would collapse under the additional burdens respondents seek to impose.

What NPDES would most unfortunately accomplish is to take restoration of the Everglades, a world treasure, out of the consensus-building management process that has been developed over decades of State and federal effort—a process that every responsible agency, not to mention Congress, has endorsed as the best hope of restoring the Everglades.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
PETITIONER

*v.*

MICCOSUKEE TRIBE OF INDIANS, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether petitioner's longstanding practice of pumping accumulated water from a water collection canal to a water conservation area within the Florida Everglades constitutes an addition of a pollutant from a point source for purposes of Section 402 of the Clean Water Act, 33 U.S.C. 1342, where the water contains a pollutant but the pumping station itself adds no pollutants to the water being pumped.

TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 2 |
| A. The Clean Water Act | 3 |
| B. The SFWMD's water control activities | 6 |
| C. The water control facilities at issue | 9 |
| D. The proceedings in this case | 11 |
| Summary of argument | 12 |
| Argument: | |
| The Clean Water Act does not require the SFWMD to obtain an NPDES permit for operation of water control facilities that merely convey or connect navigable waters | 15 |
| A. The Clean Water Act's definition of "discharge of a pollutant" does not include activities that merely convey or connect navigable waters | 15 |
| B. The Clean Water Act does not require an NPDES permit for every discharge from a point source that might be described as "the cause-in-fact" of the release of pollutants into navigable waters | 21 |
| C. The Clean Water Act expresses Congress's understanding that facilities that merely convey or connect navigable waters would be regulated through means other than the NPDES permitting program | 25 |
| Conclusion | 29 |
| Addendum | 1a |

## TABLE OF AUTHORITIES


Cases: Page

*Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983) ..... 23
*Borden Ranch P'ship* v. *United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), aff'd, 123 S. Ct. 599 (2002) ..... 4
*California* v. *United States*, 438 U.S. 645 (1978) ..... 26
*Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... 18
*City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants, In re*, 9 E.A.D. 515, 2000 WL 1664964 (EPA Envtl. App. Bd. Nov. 1, 2000) .. 24
*Dubois* v. *United States Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997) ..... 18
*Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) ..... 6
*Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) ..... 28
*Missouri ex rel. Ashcroft* v. *Department of Army*, 672 F.2d 1297 (8th Cir. 1982) ..... 17
*National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) ..... 17, 23, 24
*National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... 17, 19, 21, 23, 24
*Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002), cert. denied, 123 S. Ct. 2573 (2003) ..... 5
*PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994) ..... 25
*Rybachek* v. *EPA*, 904 F.2d 1276 (9th Cir. 1990) ..... 22
*United States* v. *Deaton*, 209 F.3d 331 (4th Cir. 2000) ..... 23





Cases—Continued: Page

*United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988) ..... 23
*United States* v. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567 (S.D. Fla. 1992), aff'd and rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied, 514 U.S. 1107 (1995) ..... 7, 8

Statutes and regulations:

Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.* ..... 1
Subch. I, 33 U.S.C. 1251-1274 ..... 3
§ 101(a), 33 U.S.C. 1251(a) ..... 3
§ 101(b), 33 U.S.C. 1251(b) ..... 3, 25
§ 101(g), 33 U.S.C. 1251(g) ..... 3, 25, 1a
§ 102(b), 33 U.S.C. 1252 ..... 27
Subch. II, 33 U.S.C. 1281-1301 ..... 3
§ 208, 33 U.S.C. 1288 ..... 5
§ 208(b)(2)(F), 33 U.S.C. 1288(b)(2)(F) ..... 6, 27
Subch. III, 33 U.S.C. 1311-1330 ..... 3
§ 301, 33 U.S.C. 1311 ..... 4, 1a
§ 301(a), 33 U.S.C. 1311(a) ..... 4, 11
§ 301(b)(1)(B), 33 U.S.C. 1311(b)(1)(B) ..... 22
§ 302, 33 U.S.C. 1312 ..... 4
§ 303(f), 33 U.S.C. 1313(f) ..... 6
§ 304(f), 33 U.S.C. 1314(f) ..... 6
§ 304(f)(2)(F), 33 U.S.C. 1314(f)(2)(F) ..... 26
§ 306, 33 U.S.C. 1316 ..... 4
§ 306(a), 33 U.S.C. 1316(a) ..... 4
§ 307, 33 U.S.C. 1317 ..... 4
§ 309, 33 U.S.C. 1319 ..... 6
§ 318, 33 U.S.C. 1328 ..... 4
§ 319, 33 U.S.C. 1329 ..... 5, 6, 27
Subch. IV, 33 U.S.C. 1341-1346 ..... 3
§ 401, 33 U.S.C. 1341 ..... 27
§ 402, 33 U.S.C. 1342 ..... 1, 2, 4, 11, 2a

Statutes and regulations—Continued: Page

§ 402(a), 33 U.S.C. 1342(a) ..... 2, 13, 15
§ 402(a)(1), 33 U.S.C. 1342(a)(1) ..... 4
§ 402(p), 33 U.S.C. 1342(p) ..... 22
§ 404, 33 U.S.C. 1344 ..... 23
Subch. V, 33 U.S.C. 1361-1377 ..... 3
§ 502(6), 33 U.S.C. 1362(6) ..... 5, 22, 3a
§ 502(7), 33 U.S.C. 1362(7) ..... 5, 13, 16, 3a
§ 502(11), 33 U.S.C. 1362(11) ..... 4
§ 502(12), 33 U.S.C. 1362(12) ..... 5, 13, 15, 16, 19, 21, 3a
§ 502(13), 33 U.S.C. 1362(13) ..... 4
§ 502(14), 33 U.S.C. 1362(14) ..... 5, 21, 3a
§ 505(a), 33 U.S.C. 1365(a) ..... 6
Subch. VI, 33 U.S.C. 1381-1387 ..... 3
Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 ..... 3
Flood Control Act of 1948, ch. 771, § 203, 62 Stat. 1175 ..... 7
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* ..... 27-28
42 U.S.C. 4332 ..... 28
Water Resources Development Act of 1996, Pub. L. No. 104-303, 110 Stat. 3658:
§ 528(b)(1)(A)(i), 110 Stat. 3767 ..... 8
§ 528(f), 110 Stat. 3770-3772 ..... 8
Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2571:
§ 601(a)(5), 114 Stat. 2680 ..... 9
§ 601(b), 114 Stat. 2680 ..... 28
§ 601(b)(1)(A), 114 Stat. 2680-2681 ..... 9
§ 601(b)(2), 114 Stat. 2681-2683 ..... 9
§ 601(b)(2)(A)(ii)(I), 114 Stat. 2681 ..... 10
§ 601(b)(2)(A)(ii)(II), 114 Stat. 2681 ..... 9
§ 601(b)(2)(C)(iv), 114 Stat. 2682 ..... 10
§ 601(b)(2)(C)(v), 114 Stat. 2682 ..... 10
§ 602(a), 114 Stat. 2693 ..... 9



Statutes and regulations—Continued: Page

Fla. Stat. Ann. (West Supp. 2003):
§ 373.069 ..... 6
§ 373.4592 ..... 8
§ 373.4592(9)(k) ..... 10
§ 373.4592(9)(l) ..... 10
40 C.F.R.:
Pt. 122 ..... 6
Section 122.2 ..... 6, 16, 23
Section 122.45(g) ..... 23
Pt. 125 ..... 6
Sections 125.80-125.89 ..... 5, 23
Pt. 132:
App. F ..... 23

Miscellaneous:

CERP Website: *http://www.evergladesplan.org/* ..... 9, 11
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# In the Supreme Court of the United States

No. 02-626

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
PETITIONER

*v.*

MICCOSUKEE TRIBE OF INDIANS, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING PETITIONER**

## INTEREST OF THE UNITED STATES

Petitioner South Florida Water Management District (SFWMD) operates an extensive system of levees and canals. Among other activities, it pumps accumulated water, which would otherwise flood populated areas, from water collection canals to water conservation areas within the Florida Everglades region. The question presented in this case is whether the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, requires the SFWMD to obtain a permit under the National Pollution Discharge Elimination System (NPDES) before engaging in that activity. See CWA § 402, 33 U.S.C. 1342. The United States has a substantial interest in this question because the Environmental Protection Agency (EPA) administers the NPDES permitting program in conjunction with individual States that have assumed respon-

sibility for issuing permits within their borders. See CWA § 402, 33 U.S.C. 1342. The United States has a particular interest in this case because of its role in implementing the Comprehensive Everglades Restoration Plan, which the Secretary of the Army developed in consultation with the parties to this action and in conjunction with a host of other federal, state, tribal, regional and local agencies, to address regional water quality issues. At the Court's invitation, the Solicitor General filed a brief amicus curiae in response to the petition for writ of certiorari. The United States submits that the court of appeals erred in requiring the SFWMD to obtain an NPDES permit because the SFWMD's pumping activity does not result in "the discharge of any pollutant" (33 U.S.C. 1342(a)) within the meaning of the Clean Water Act.

## STATEMENT

Petitioner operates numerous water control facilities in southern Florida, including the C-11 canal, which collects accumulated water from heavily populated portions of Broward County, and the S-9 pumping station, which discharges that water into Water Conservation Area-3A (WCA-3A), adjacent to the Everglades National Park. Pet. App. 2a-3a. The pumping station itself does not add any pollutant into the discharged water. *Id.* at 3a. The C-11 canal water contains, however, higher levels of phosphorus than the waters in WCA-3A. *Ibid.* Respondents, the Miccosukee Tribe of Indians and the Friends of the Everglades, brought suit in the United States District Court for the Southern District of Florida, asserting that petitioner must obtain an NPDES permit under Section 402 of the Clean Water Act (CWA), 33 U.S.C. 1342, to engage in the pumping activity. Pet. App. 2a. The district court ruled on summary judgment that petitioner must obtain an NPDES permit and granted respondents' request for an injunction. *Ibid.* The



court of appeals affirmed the district court's determination that a permit was necessary, but vacated the injunction and remanded the case for further proceedings. *Id.* at 14a.

### A. The Clean Water Act

Congress enacted the Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, to respond comprehensively, as a matter of national policy, to the complex problem of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. CWA § 101(a), 33 U.S.C. 1251(a). That enactment and its amendments, now commonly known as the Clean Water Act, establish an important role for the federal government, but they also recognize the primary responsibilities of the individual States to protect water quality and to manage water resources, including "the authority of each State to allocate quantities of water within its jurisdiction." CWA § 101(b) and (g), 33 U.S.C. 1251(b) and (g).

The Clean Water Act addresses the problem of water pollution through a multi-faceted federal-state approach that includes provisions directed to research and related programs (Subch. I, 33 U.S.C. 1251-1274), grants for construction of treatment works (Subch. II, 33 U.S.C. 1281-1301), the establishment and enforcement of standards, including effluent and water quality standards (Subch. III, 33 U.S.C. 1311-1330), and the issuance of permits and licenses (Subch. IV, 33 U.S.C. 1341-1346). The Act also contains general provisions, including definitions of key terms (Subch. V, 33 U.S.C. 1361-1377), and provisions respecting grants to States for water pollution control revolving funds (Subch. VI, 33 U.S.C. 1381-1387).

The focus of the dispute in this case is the Clean Water Act's provisions for controlling the discharge of pollutants into navigable waters. Section 301(a) of the Act states:

> Except as in compliance with this section [301] and [Sections 302, 306, 307, 318, 402 and 404 of the Clean Water Act], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. 1311(a). The identified sections impose various types of pollution control requirements.

For example, Sections 301 and 302 direct EPA to establish specified types of effluent limitations. See 33 U.S.C. 1311, 1312; see also 33 U.S.C. 1362(11) (defining "effluent limitation"). Section 306 directs EPA to establish standards of performance for new sources, 33 U.S.C. 1316, and Section 307 directs EPA to establish standards for toxic pollutants and pretreatment of discharges into treatment works, 33 U.S.C. 1317. See 33 U.S.C. 1316(a) (defining "standard of performance" and "new source"); 33 U.S.C. 1362(13) (defining "toxic pollutant"). Section 318 addresses discharges of pollutants from aquaculture projects. 33 U.S.C. 1328.

This case implicates Section 402, which creates the NPDES permitting program. See 33 U.S.C. 1342. Section 402(a)(1) provides that EPA (or a qualifying State) "may, after the opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a) of the Clean Water Act]," upon condition that such discharge will meet specified requirements. 33 U.S.C. 1342(a)(1). Section 404 establishes a separate permitting program, administered by the Army Corps of Engineers, specifically directed to the "discharge of dredged or fill materials." See *Borden Ranch P'ship* v. *United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), aff'd, 123 S. Ct. 599 (2002) (per curiam). This case does not involve the discharge of dredged or fill materials, and that federal permitting program is not at issue in this case.

The Section 402 permitting program regulates the "discharge of any pollutant," 33 U.S.C. 1342(a)(1), which is a



statutory term of art. Section 502(12) of the Clean Water Act defines the term "discharge of a pollutant," in relevant part, as:

> any addition of any pollutant to navigable waters from any point source.

33 U.S.C. 1362(12). Section 502(6), in turn, defines the term "pollutant" to include a variety of materials, such as "industrial, municipal, and agricultural waste." 33 U.S.C. 1362(6). Section 502(7) defines the term "navigable waters" to mean "the waters of the United States." 33 U.S.C. 1362(7). And Section 502(14) defines the term "point source" to mean "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14).[1]

The Clean Water Act's distinction between point sources and nonpoint sources reflects an important legislative judgment. Congress recognized that a wide variety of human and nonhuman activities affect water quality and that the government's response to water pollution must be tailored to the nature of the activity and the severity of the threat. Congress determined that, as a general matter, federal permitting programs, such as the NPDES regime, are the appropriate regulatory response for addressing the addition of pollutants to the waters of the United States from "discernible, confined and discrete conveyance[s]," but that different

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[1] The Clean Water Act uses, but does not define, the term "nonpoint source." CWA §§ 208, 319, 33 U.S.C. 1288, 1329. The textbook examples of nonpoint sources are various forms of runoff, which reach waterbodies by flowing over or percolating through topographical features. See, *e.g.*, Robert Percival et al., *Environmental Regulation* 630 (3d ed. 2000); *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) ("Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source."), cert. denied, 123 S. Ct. 2573 (2003).

approaches are the more appropriate response in other circumstances.

For example, the Clean Water Act's NPDES permitting program typically imposes limitations on a point source discharge by establishing permissible rates, concentrations, or quantities of specified constituents at the point where the discharge stream enters the waters of the United States. See 33 U.S.C. 1342(a)(1) and (2); see generally 40 C.F.R. Pts. 122, 125; see, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000). The Clean Water Act does not impose, however, analogous requirements for nonpoint sources. Instead, Sections 208, 304(f), and 319 encourage the States to develop local programs, that may include techniques such as land use requirements, to control nonpoint sources of pollution. See, *e.g.*, 33 U.S.C. 1288(b)(2)(F); 33 U.S.C. 1314(f), 1313(f), 1329.

The Clean Water Act provides mechanisms for enforcing the NPDES permit requirements. Section 309 provides that the government may respond to violations by issuing compliance orders, pursuing injunctive relief, and seeking criminal and civil penalties. See 33 U.S.C. 1319. Section 505(a) additionally authorizes "any citizen" to commence a civil action against any person alleged to be in violation of an effluent standard or limitation under the Act. 33 U.S.C. 1365(a). District courts presiding over such "citizen suits" have jurisdiction to enforce permit requirements and order payment of civil penalties as provided in Section 309. *Ibid.* See, *e.g.*, *Friends of the Earth*, 528 U.S. at 175-176.

**B. The SFWMD's Water Control Activities**

The SFWMD has responsibility for operating water control facilities in southern Florida, which has unique hydrological characteristics. See Fla. Stat. Ann. § 373.069 (West Supp. 2003). The dominant feature of the area is the Everglades, a wetlands system that once encompassed much of



southern Florida. To accommodate human habitation, the State of Florida and the United States, through the Army Corps of Engineers (Corps), have constructed elaborate projects that have altered the natural flow of water. While water once moved in a slow, unimpeded sheet from Lake Okeechobee through the Everglades to the sea, it is now directed through drainage canals and related facilities away from the heavily populated areas of Broward and Dade Counties. See Pet. App. 2a-3a.

The SFWMD is the local sponsor of the Corps' Central and Southern Florida Project (C&SF Project), a vast system of levees, canals, water impoundment areas, and other water control structures. Congress authorized the Corps to construct the C&SF Project in 1948 to promote the multiple objectives of flood control, drainage, preservation of fish and wildlife, and control of regional groundwater and salinity in southern Florida. Flood Control Act of 1948, ch. 771, § 203, 62 Stat. 1175. The SFWMD operates the C&SF Project in accordance with Corps guidelines. See Pet. 9; Pet. App. 2a-3a.

The SFWMD's water control activities have been the subject of previous litigation. In 1988, the United States brought an action against petitioner and the Florida Department of Environmental Regulation, alleging, among other things, that those agencies allowed phosphorus-polluted water to be diverted into the Everglades National Park in violation of state law and federal contracts. See *United States* v. *South Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567, 1569 (S.D. Fla. 1992), aff'd in part and rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied, 514 U.S. 1107 (1995). The presence of abnormal levels of phosphorus adversely impacts the unique aquatic flora and fauna of the Everglades system, which thrive in a phosphorus-restricted environment.

The 1988 lawsuit resulted in a 1992 consent decree that required petitioner to construct stormwater-treatment

areas, which are marshes designed to filter nutrients from farm-water runoff that might otherwise adversely affect the Everglades National Park. See 847 F. Supp. at 1569-1570. The consent decree also required Florida to establish a permitting program to improve the quality of runoff entering the Everglades. *Ibid.* The Florida Legislature later enacted the Everglades Forever Act of 1994 to facilitate implementation of the consent decree. See Fla. Stat. Ann. § 373.4592 (West Supp. 2003).

Congress has assisted the State of Florida and the SFWMD in addressing Everglades water quality issues. In 1996, Congress directed the Secretary of the Army to develop a "comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem." Water Resources Development Act of 1996 (WRDA 1996), Pub. L. No. 104-303, § 528(b)(1)(A)(i), 110 Stat. 3767. Congress specified that the Secretary's plan "provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades." *Ibid.* Congress also directed the Secretary to include features as "necessary to provide for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives served by the Central and Southern Florida Project." 110 Stat. 3767, 3768. Congress further directed the Secretary to develop the plan in coordination with the SFWMD and in consultation with the South Florida Ecosystem Restoration Task Force, an intergovernmental body (with representatives from the SFWMD and one of the respondents, the Miccosukee Tribe) charged with coordinating the development of federal, state, and tribal policies and strategies to restore and protect the Everglades. WRDA 1996 § 528(f), 110 Stat. 3770-3772.

Four years later, Congress approved the Secretary's Comprehensive Everglades Restoration Plan (CERP) through the Water Resources Development Act of 2000



(WRDA 2000), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693. The CERP provides for modifications of the C&SF Project to "restore, preserve, and protect the South Florida ecosystem," including the Everglades, "while providing for other water-related needs of the region, including water supply and flood protection." WRDA 2000 § 601(b)(1)(A) and (f)(2)(A), 114 Stat. 2680-2681, 2686. Congress specifically defined the term "South Florida ecosystem" to mean the area "within the boundary of the South Florida Water Management District," including "the Everglades." WRDA 2000 § 601(a)(5), 114 Stat. 2680.

The CERP is intended, among other things, "to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem." WRDA 2000 § 601(b)(1)(A), 114 Stat. 2681. To achieve the CERP's goals, Congress has authorized more than one billion dollars in initial projects. See, *e.g.*, § 601(b)(2), 114 Stat. 2681-2683. In implementing those projects, the Secretary must "ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." § 601(b)(2)(A)(ii)(II), 114 Stat. 2681. The Secretary implements those projects in cooperation with the SFWMD.[2]

### C. The Water Control Facilities At Issue

The dispute in this case arises from the SFWMD's operation of water control facilities that are part of the C&SF Project. Those facilities transport excess water from areas of Broward County westward through the C-11 canal to a

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[2] The CERP is described in detail at the CERP Website: *http://www.evergladesplan.org/*.

water conservation area, WCA-3A, to prevent flooding of heavily populated residential and commercial areas.

The Army Corps of Engineers initially constructed what is now known as the C-11 canal to facilitate drainage and development of Broward County. Later, as part of the C&SF Project, the Corps built two north-south levees, L-33 and L-37, which form the western boundary of the C-11 basin and create WCA-3A, which extends west of the levees. Pet. App. 3a & n.2, 8a & n.8, 28a. The C&SF Project added the S-9 pumping station to transport water from the C-11 canal, through the L-33 and L-37 levees, into WCA-3A. The S-9 pumping station is located where the two levees meet, at the north end of L-33 and the south end of L-37. Petitioner now operates the S-9 pumping station, which is the specific facility at issue in this case. See Pet. App. 2a-3a; see also Pet. 9-10.

The S-9 pumping station transports the run-off collected by the C-11 canal, as well as seepage from WCA-3A into the C-11 basin, through three pipes that discharge water into WCA-3A at the rate of 960 cubic feet per second per pipe. Petitioner has obtained a water quality permit for the S-9 pumping station pursuant to the Everglades Forever Act. See Pet. 12; Fla. Stat. Ann. § 373.4592(9)(k) and (l) (West Supp. 2003). See also WRDA 2000 § 601(b)(2)(A)(ii)(I), 114 Stat. 2681 (requiring that CERP projects "take into account the protection of water quality by considering applicable State water quality standards").[3]

[3] A significant amount of water seeps from WCA-3A through the levees into the C-11 basin. As part of the CERP, Congress has authorized a levee seepage management project for WCA-3A and a neighboring water conservation area at a total cost of $100,335,000. WRDA 2000 § 601(b)(2)(C)(iv), 114 Stat. 2682. That project, which is scheduled to begin in September 2004, will be located just south of the S-9 pumping station. Congress also authorized $124,837,000 for a C-11 impoundment and stormwater treatment area. WRDA 2000 § 601(b)(2)(C)(v), 114 Stat. 2682. That project will manage the runoff from the western C-11 basin by capturing it in a stormwater impoundment for treatment before it enters WCA-3A. Those projects are described in detail at the CERP Website: *http://www.evergladesplan.org/*.



The S-9 pumping station transports water from the C-11 canal to WCA-3A, but it does not add anything to the waters being pumped. The water that the C-11 canal collects and that the S-9 pumping station conveys, however, contains phosphorus at levels higher than those found in WCA-3A. The excessive phosphorus originates from the various point and nonpoint sources that drain into the C-11 canal. See Pet. App. 3a.

**D. The Proceedings In This Case**

Respondents brought this citizen suit under Section 505 of the CWA, 33 U.S.C. 1365, alleging that the SFWMD is in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a). Respondents specifically alleged that the Clean Water Act requires the SFWMD to obtain an NPDES permit pursuant to Section 402, 33 U.S.C. 1342, for operation of the S-9 pumping station. In respondents' view, the operation of the S-9 pumping station results in the addition of a pollutant to navigable waters from a point source. See Pet. App. 2a, 17a-18a, 20a-21a.

On cross-motions for summary judgment, the district court denied the SFWMD's motion and granted summary judgment to respondents. Pet. App. 2a, 20a-21a, 31a-32a. The district court first noted the parties' agreement that, for purposes of the Clean Water Act, the C-11 canal and WCA-3A are "navigable waters" and the water that the S-9 pumping station pumps into WCA-3A contains "pollutant[s]." *Id.* at 21a. It then concluded that "an addition of pollutants exists because undisputedly water containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, both of which are separate bodies of United

States water with * * * different quality levels." *Id.* at 28a. The court further concluded that the S-9 pumping station "is a point source for which a NPDES permit is required." *Id.* at 29a. The district court enjoined the SFWMD from operating the S-9 pumping station without an NPDES permit, but stayed its ruling pending appeal. *Id.* at 2a, 12a & n.12, 31a-32a.

The court of appeals affirmed "the district court's judgment that the [SFWMD] violated the Clean Water Act," but vacated the injunction and remanded for further proceedings. Pet. App. 14a. The court of appeals concluded "that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters," *id.* at 7a, and that the S-9 pump station added pollutants to WCA-3A because, except for the operation of that pump station, the polluted waters from the C-11 canal would not have flowed there. *Id.* at 7a-9a. The court of appeals nevertheless vacated the district court's injunction because "the district court could not have correctly balanced the possible harms—especially the harm to the public—caused by the enjoinment of S-9 against the benefits when it granted its injunction." *Id.* at 13a. Instead, the court of appeals directed the district court to "order the [SFWMD] to obtain an NPDES permit within some reasonable time period." *Id.* at 14a.

## SUMMARY OF ARGUMENT

The Clean Water Act does not require the SFWMD to obtain an NPDES permit for its S-9 pumping station, which merely conveys navigable waters from a water collection canal to a water conservation area. Congress did not intend to impose the NPDES permitting requirements on that water control facility or on the many comparable facilities throughout the Nation that do no more than convey or connect navigable waters. Rather, Congress contemplated that



water quality issues arising from the transportation of navigable waters would generally be addressed through federal and state mechanisms other than the NPDES permitting program.

A. Section 402(a) of the Clean Water Act requires an NPDES permit for the "discharge of any pollutant," which Section 502(12) of the Act defines as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1342(a), 33 U.S.C. 1362(12). The S-9 pumping station does not add pollutants to "navigable waters," which Section 502(7) further defines as "the waters of the United States," 33 U.S.C. 1362(7). Rather, the pumping station merely transports navigable waters from one location to another. Any pollutants in the C-11 canal are already in "the waters of the United States" when those waters enter the S-9 pumping station for discharge into the WCA-3A water conservation area. The pumping station accordingly does not introduce any pollutants into the waters of the United States from the outside world. The same result follows whether the C-11 canal and the water conservation area are viewed as a single body or separate bodies of navigable water. In either case, the S-9 pumping station transports "waters of the United States" that already contain pollutants from one location to another; it does not add pollutants to "the waters of the United States."

B. The court of appeals erred in concluding that a point source adds a pollutant whenever the point source might be characterized as the "cause-in-fact" of the presence of pollutants in a navigable waterbody. That test reaches far beyond the Clean Water Act's terms, which define a "discharge of a pollutant" to mean the actual release of pollutants into "the waters of the United States." The court correctly rejected the notion that pollutants can be added "from" a point source only if the point source itself generates or is the originating source of the pollutants. But it is not the case

that the point source need only be a "but-for cause" of the presence of pollution in a particular body of navigable waters. The point source must do more than merely convey or connect navigable waters that already contain pollutants. Rather, it must convey a material that qualifies as a pollutant from the outside world into "the waters of the United States."

C. The Clean Water Act, read as a whole, fully supports the conclusion that Section 402 does not require an NPDES permit for water control facilities that merely convey or connect navigable waters. Congress recognized that the States have important responsibilities in distributing and allocating water and that the Clean Water Act's requirements should not unduly interfere with those responsibilities. Congress also made clear that many serious water quality issues, such as the problem of nonpoint source pollution, must be addressed through mechanisms other than the NPDES permitting program. The Clean Water Act, as well as other federal legislation, accordingly provides alternative means for addressing water quality issues that result from the construction and operation of water resource development projects. Congress and the State of Florida have specifically provided mechanisms for comprehensively addressing the water quality issues in the South Florida ecosystem. The court of appeals' mistaken imposition of NPDES permitting requirements on the S-9 pumping station is unlikely to provide any substantial environmental benefits. Rather, it would likely misdirect governmental resources and potentially hinder the Everglades restoration process.



## ARGUMENT

### THE CLEAN WATER ACT DOES NOT REQUIRE THE SFWMD TO OBTAIN AN NPDES PERMIT FOR OPERATION OF WATER CONTROL FACILITIES THAT MERELY CONVEY OR CONNECT NAVIGABLE WATERS

The Clean Water Act requires the SFWMD to obtain an NPDES permit if the SFWMD's activities add a pollutant to navigable waters from a point source. The Act does not require an NPDES permit, however, for activities that involve nothing more than conveyance or connection of navigable waters. Nor does it require an NPDES permit simply because a point source might be described as "the cause-in-fact" of a release of pollutants into navigable waters. The text and structure of the Clean Water Act make clear that Congress had no intention to subject ordinary water control and distribution activities, including the typical operation of flood control projects, reclamation projects, and other such water diversion projects, to the NPDES permitting regime. Rather, Congress determined that the water quality issues arising from those activities should be addressed through other programs that provide alternative means of achieving the Clean Water Act's goals.

#### A. The Clean Water Act's Definition Of "Discharge Of A Pollutant" Does Not Include Activities That Merely Convey Or Connect Navigable Waters

The Clean Water Act's NPDES permitting requirements, set out in Section 402, apply only to the "discharge of any pollutant." 33 U.S.C. 1342(a). Section 502(12) of the Clean Water Act defines "discharge of a pollutant," in relevant part, as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). That definition has a broad reach, but it does not, by its express terms, include the operation of the S-9 pumping station, which

merely transfers concededly "navigable waters" from a water collection canal through a levee to a water conservation area.

Section 502(12) makes clear that, in order to qualify as a "discharge of a pollutant," the activity must add a pollutant from a "point source" to "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. 1362(12); see CWA § 502(7), 33 U.S.C. 1362(7); 40 C.F.R. 122.2. Section 502(12) cannot reasonably be understood to include an activity that merely transports navigable waters from one location, through a "point source," to another location. Such an activity can conceivably lead to changes in water quality, but it does not, within the normal meaning of the relevant terms, constitute an "addition" of any pollutant to "the waters of the United States." See *Webster's Third New International Dictionary* 24 (1993) (defining "addition" in relevant part, as "the joining or uniting of one thing to another"). Whatever pollutants the waters contain are already *in* "the waters of the United States" when those waters pass through the "point source." The point source merely conveys those waters, which retain their status as navigable waters.

For example, a water resources project might require the transportation of navigable waters to a reservoir for retention and later release, and the storage of the water may induce changes in water quality and pollutant levels, including, for example, changes in chemical, physical, and biological characteristics. Nevertheless, EPA and the lower courts have long recognized that the process of merely transporting, impounding, and releasing navigable waters that may already contain pollutants does not constitute an "addition" of pollutants to "the waters of the United States" in the sense that the Clean Water Act uses those terms. Rather, an "addition from a point source occurs only if the point source itself physically introduces a pollutant into water



from the outside world." *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

In *Gorsuch*, environmental plaintiffs petitioned EPA to impose NPDES permit requirements on dams that stored and periodically released water. The impoundment and release of stored water resulted in "dam-induced changes," including low dissolved oxygen, dissolved minerals and nutrients, temperature changes, and supersaturation. 693 F.2d at 161-164. The District of Columbia Circuit concluded, in accordance with EPA's views, that the dam operator did not need to obtain an NPDES permit. *Id.* at 161, 170-183. Similarly, in *Consumers Power*, environmental plaintiffs sought to impose NPDES permit requirements on a hydroelectric facility that drew water from Lake Michigan into a man-made impoundment above a dam and generated power by discharging the lake water back into the lake through the dam's turbines. 862 F.2d at 581-583. Like the District of Columbia Circuit, the Sixth Circuit agreed with EPA's position that the dam operator did not need to obtain an NPDES permit, stating that the "facility's movement of pollutants already in the water is not an 'addition' of pollutants to navigable waters of the United States." *Id.* at 581. See *id.* at 586 (the pollutants "always remain within the waters of the United States, and hence cannot be added").[4]

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[4] The Sixth Circuit and the District of Columbia Circuit each grounded its decision, in significant part, on deference to EPA's views. See *Consumers Power*, 862 F.2d at 584; *Gorsuch*, 693 F.2d at 161, 170-183. That result also follows based on a straightforward reading of the Clean Water Act's text. See *Missouri ex rel. Ashcroft* v. *Department of the Army*, 672 F.2d 1297, 1303-1304 (8th Cir. 1982) (holding that dam-induced changes in water quality such as soil erosion and reduced oxygen did not constitute the addition of a pollutant from a point source).

Three courts of appeals, including the court of appeals below, have nevertheless suggested that a distinction should be drawn if the water control facility transfers water between two separate bodies of water. Pet. App. 7a-8a & nn. 7-8; *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 490-492 (2d Cir. 2001); *Dubois* v. *United States Dep't of Agriculture*, 102 F.3d 1273, 1296-1299 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997). The court of appeals in this case, for example, reasoned that, while the C-11 canal and WCA-3A are "waters of the United States," they are "two separate and distinct bodies of water." Pet. App. 8a n.8. The First Circuit in *Dubois* and the Second Circuit in *Catskill Mountains* reached similar conclusions under somewhat different facts. See *id.* at 8a n.7.[5]

The United States submits that the distinction suggested by those courts is unsound. The determination whether an NPDES permit is required should not depend on whether the water control facility at issue conveys waters of the United States from one location to another or whether it connects what are arguably two distinct bodies of navigable waters. So long as the water control facility at issue does not

[5] In *Dubois*, a ski resort proposed to transfer water from a river at the base of the ski slope, use it to operate snow-making equipment, and then discharge it into Loon Pond, a small naturally occurring lake, at a higher elevation. 102 F.3d at 1296-1297. The river would not normally flow into the pond, which was colder and had lower levels of phosphorus. *Id.* at 1298-1299. The court held that, regardless of whether the resort's snow-making equipment contributed additional pollutants, the transfer required an NPDES permit. *Id.* at 1296 n.29. Similarly, in *Catskill Mountains*, the court of appeals held that the City of New York's transfer of water allegedly containing suspended solids through a several-mile-long tunnel from a reservoir into a creek, which was naturally clearer and cooler than the reservoir and which the water would otherwise not reach, would also qualify as an "addition" of a pollutant that required an NPDES permit. 273 F.3d at 484-485, 492.



add pollutants to "the waters of the United States," an NPDES permit is not required. See *Gorsuch*, 693 F.2d at 175 (noting the United States' longstanding view that "the point or nonpoint character of pollution * * * does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)").

The Clean Water Act's definitions support that conclusion. Section 510(12) defines the "discharge of a pollutant" to include "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. 1362(12) (emphasis added). Its use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach. The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a different part is not a "discharge of a pollutant" within the meaning of the Act.

If Congress had intended that the movement of one body of navigable waters into another body of navigable waters should be treated as the addition of a pollutant to navigable waters, it would have made that extraordinary intention manifest. At the least, it would have defined the "discharge of a pollutant" to include "any addition of any pollutant to [a specific portion of the] navigable waters from any point source," 33 U.S.C. 1362(12). Indeed, Congress elsewhere used precisely that type of phrase when it intended to refer to only a portion of "the waters of the United States," rather than the whole. See CWA § 302(a) 33 U.S.C. 1312(a) ("a specific portion of the navigable waters"). Congress would

not have extended NPDES permitting requirements to potentially thousands of water diversion facilities without any textual acknowledgment of that intention.

The court of appeals' distinction would also lead to incongruous and unmanageable results. As this case indicates, it is no simple matter to distinguish between "separate and distinct bodies of water." Pet. App. 8a n.8. The court of appeals recognized that the waters comprising the C-11 basin and the WCA-3A are hydrologically related and that, "[b]ut for man's intervention, these waters would essentially be a single body of navigable water." *Ibid.* The court provided no principled basis for treating the C-11 canal and WCA-3A as two separate bodies of water beyond the fact that "without the operation of the S-9 pump station," the water in the C-11 canal "would not normally flow" into WCA-3A. *Id.* at 8a. That mechanical test ignores the fact that those waters share a close hydrological association and are managed as a single water resource. Under the court of appeals' view, virtually any pumping station, dam, water diversion facility, or control valve could be viewed as creating "two separate and distinct bodies of water." *Id.* at 8a n.8.

The Court has no need to engage in the fruitless task of attempting to fashion a test that distinguishes between single and multiple waterbodies, because the Clean Water Act does not require any such test in this context. Section 402 requires a permit only if there is an addition of a pollutant to "the waters of the United States." An NPDES permit is unnecessary if the water control facility does no more than convey or connect such waters.



### B. The Clean Water Act Does Not Require An NPDES Permit For Every Discharge From A Point Source That Might Be Described As "The Cause-In-Fact" Of The Release Of Pollutants Into Navigable Waters

The court of appeals' ruling that the SFWMD must obtain an NPDES permit for the S-9 pumping station should be reversed for the straightforward reason that the pumping station does not "add" pollutants to "the waters of the United States." Accordingly, there is no occasion to address the additional question whether the supposed addition was "from any point source." See CWA § 502(12), 33 U.S.C. 1362(12). Nevertheless, the court of appeals reached that issue, and it incorrectly concluded that "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." Pet. App. 7a.

The court of appeals correctly rejected the SFWMD's argument (Pet. 20) that pollutants are added "from" a point source only if the point source itself is the origin of the pollutants. See Pet. App. 7a n.6. The District of Columbia Circuit rejected that interpretation more than 20 years ago. See *Gorsuch*, 693 F.2d at 175 n.58. A "point source" is, by statutory definition, a "discernible, confined, and discrete *conveyance*." CWA § 502(14), 33 U.S.C. 1362(14) (emphasis added). That definition signifies that a point source itself need not generate or be the originating source of the pollutant; it need only convey the pollutant into "the waters of the United States." That understanding is consistent with Section 502(14)'s representative examples, which include a "pipe, ditch, channel, tunnel, [and] conduit." 33 U.S.C. 1362(14). Those objects all typically transport, rather than generate, pollutants, such as "sewage," "biological mate-

rials," and "industrial, municipal, and agricultural waste," CWA § 502(6), 33 U.S.C. 1362(6).[6]

The court of appeals erred, however, in concluding at the other extreme that "the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." Pet. App. 7a. The court reasoned that this result follows from the dictionary definition of "from," which can connote the "agent or instrumentality" or the "cause or reason." *Id.* at 7a n.6. The more apt definition, however, particularly in the context of a "point source," connotes a physical relationship, such as "a point or place where an actual physical movement * * * has its beginning." *Webster's Third New International Dictionary* 913 (1993). As explained above, Section 502(12)'s definition of the "discharge of a pollutant" is intended to encompass the actual release of a pollutant into "the waters of the United States." This case illustrates the distinction. The S-9 pumping station does not add pollutants to the waters of the United States "from any point source" because the pumping station does not physically add *anything* into those waters; instead, it merely conveys or connects navigable waters, which already contain pollutants.[7]

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[6] A requirement that a point source be the "original source" of a pollutant would also be inconsistent with the Clean Water Act's manifest aim to impose permitting requirements on facilities, such as publicly owned treatment works and municipal storm sewer systems, that do not themselves generate the pollutants in the water they treat, but do introduce those pollutants into the navigable waters. See CWA §§ 301(b)(1)(B), 402(p), 33 U.S.C. 1311(b)(1)(B), 1342(p).

[7] The activities at issue here stand in sharp contrast to other activities that have long been subject to the Clean Water Act's permitting requirements. For example, Section 402 subjects placer mining of ore deposits in streams and rivers to the NPDES permitting program because the process results in the excavation and point source discharge of dirt and gravel into navigable waters. See *Rybachek* v. *EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990). Similarly, Section 404 of the Clean Water Act, which specifically addresses dredge and fill activities, subjects the deposit or redeposit of dredged or fill material to a specialized permitting program because that activity results in the point source discharge of those materials into navigable waters. See 33 U.S.C. 1344; *United States* v. *Deaton*, 209 F.3d 331, 335-336 (4th Cir. 2000); *United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1503-1506 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923-925 (5th Cir. 1983).



The court of appeals' misdirected analysis highlights, however, a different and significant point. A pumping station or other water diversion facility may in fact add a pollutant to navigable waters if it does more than merely convey or connect those waters. For example, if the pumping station leaks oil, grease, or other pollutants into those waters, that addition is subject to NPDES permitting requirements. See *Consumers Power*, 862 F.2d at 586; *Gorsuch*, 693 F.2d at 165 n.22. Furthermore, if water is diverted from navigable waters for an intervening use, the water may lose its status as "waters of the United States" and consequently become subject, upon its reintroduction into navigable waters, to the NPDES permitting process. For example, an NPDES permit is normally required if an industrial user withdraws water from a navigable waterbody for process or cooling purposes and returns the used water into the same waterbody through a point source.[8] Similarly,

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[8] EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See, *e.g.*, 40 C.F.R. 122.2 (definition of process wastewater); 40 C.F.R. 125.80-125.89 (regulation of cooling towers). EPA's regulations address pollutants that are contained in water withdrawn by a facility ("intake pollutants") that are subsequently returned to waters of the United States. See 40 C.F.R.122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 C.F.R. Pt. 132, App. F Procedure 5-D and 5-E (containing regulations

an NPDES permit is normally required if a facility withdraws water from a navigable waterbody, removes preexisting pollutants to purify the water, and then discharges the removed pollutants (perhaps in concentrated form) back into the navigable waterbody while retaining the purified water for use in the facility.[9]

The question whether a particular water control facility adds or redeposits pollutants, and the question whether waters have lost their character as "waters of the United States" through intervening use, depend on the facts of the particular case. There is no reason to conclude, however, that the waters at issue in this case—and, most likely, the vast majority of waters that pass through pumping stations, dams, and water diversion facilities—are subject to NPDES requirements on those bases.[10]

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governing water-quality-based permitting of intake pollutants in the Great Lakes).

[9] For example, drinking water treatment facilities withdraw water from streams, rivers, and lakes. The withdrawn water typically contains suspended solids, which must be removed to make the water potable. The removed solids are a waste material from the treatment process and, if discharged into navigable waters, are subject to NPDES permitting requirements, even though that waste material originated in the withdrawn water. See, *e.g.*, *In re City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 2000 WL 1664964 (EPA Envtl. App. Bd. Nov. 1, 2000) (rejecting, on procedural grounds, challenges to NPDES permits for two drinking water treatment plants that draw raw water from the Arizona Canal, remove suspended solids to purify the water, and discharge the solids back into the Canal); *Final NPDES General Permits for Water Treatment Facility Discharges in the States of Massachusetts and New Hampshire*, 65 Fed. Reg. 69,000 (2000) (NPDES permits for discharges of process waste waters from drinking water treatment plants).

[10] For example, the courts have long treated water that passes through dams, including associated power generation facilities, as retaining its character as navigable waters. See *Consumers Power*, 862 F.2d at 585-586; see also *Gorsuch*, 693 F.2d at 174-175. A fortiori, water that merely



### C. The Clean Water Act Expresses Congress's Understanding That Facilities That Merely Convey Or Connect Navigable Waters Would Be Regulated Through Means Other Than the NPDES Permitting Program

The Clean Water Act, read as a whole, fully supports the conclusion that the NPDES permitting requirements do not apply to water control facilities that merely convey or connect navigable waters. The Act imposes a variety of regulatory initiatives in addition to the NPDES permitting program. It also recognizes that the States have primary responsibilities with respect to the "development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b). The Clean Water Act expresses the understanding that, as a general matter, water control facilities that merely transport "the waters of the United States" to where they can be most beneficially used are not subject to the NPDES regime.[11]

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passes through a pumping station—without any intervening use or change in composition—retains that character as well.

[11] Congress also made clear that the Clean Water Act is to be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries, stating: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Act]." CWA § 101(g), 33 U.S.C. 1251(g). The legislative history reveals that "[i]t is the purpose of this [provision] to insure that State [water] allocation systems are not subverted." 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, *A Legislative History of the Clean Water Act of 1977*, at 532 (1978); see *PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700, 721 (1994). The court of appeals' interpretation is in considerable tension with that congressional policy, because it could impose substantial obstacles to the operation of state water allocation systems. Indeed, while the court of appeals did not address the question, the rule of law adopted below could conceivably be viewed as imposing NPDES permitting requirements on an array of major water projects in the western United States, where

Congress could have expressly subjected water control facilities to the NPDES permitting program, but, as explained above, it did not. Instead, Congress directed EPA to provide federal, State, and area-wide planning agencies with information on "processes, procedures, and methods to control pollution resulting from," among other things,

> changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

CWA § 304(f)(2)(F), 33 U.S.C. 1314(f)(2)(F). Congress clearly understood that water control facilities could have an impact on water quality, but it concluded that those water quality impacts should be addressed primarily through means other than the Section 402 permitting process. Indeed, Congress recognized that the water quality issues arising from water control facilities are closely associated with "nonpoint sources" of pollution. The House Report, in its discussion of what ultimately became Section 304(f), emphasizes this point:

> Section 304 [f] addresses the problem of nonpoint sources of pollutants. This Section and the information on such nonpoint sources is among the most important in the 1972 Amendments. If our water pollution problems are to be truly solved, we are going to have to vigorously address the problems of nonpoint sources. The Committee, therefore, expects the Administrator to be most diligent

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projects such as California's Central Valley Project move vast quantities of water among and within various bodies of water in order to meet a wide range of agricultural and other needs. See, *e.g.*, *California* v. *United States*, 438 U.S. 645 (1978). Nothing in the Clean Water Act's text or history suggests that Congress intended that result. See *id.* at 653 (noting the "consistent thread of purposeful and continued deference to state water law by Congress").



> in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as * * * natural and man made changes in the normal flow of surface and ground waters.

H.R. Rep. No. 911, 92d Cong., 2d Sess. 109 (1972).

Congress recognized that the operators of water control facilities are typically not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through sources located far from those facilities and beyond control of the project operators. Indeed, many of the water quality problems associated with the South Florida ecosystem, which originate with urban or agricultural runoff, reflect that reality. Congress properly envisioned that the project operators should not be saddled with curing those regional water quality problems through the Clean Water Act's NPDES permitting regime. Instead, those problems are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. See, *e.g.*, CWA § 102(b), 33 U.S.C. 1252(b) (reservoir planning); CWA § 208(b)(2)(F), 33 U.S.C. 1288(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); CWA § 319, 33 U.S.C. 1329 (nonpoint source management programs); see also CWA § 401, 33 U.S.C. 1341 (state certification of federally licensed projects).

Water control facilities are also frequently subject to federal and state legislation, apart from the Clean Water Act, that identifies and addresses associated water quality issues. For example, federally funded projects invariably require executive recommendations and congressional authorization, which in turn trigger legislation such as the National Environmental Policy Act (NEPA), 42 U.S.C. 4321

*et seq.* NEPA requires that agencies include in every proposal for major Federal action significantly affecting the quality of the human environment a detailed statement of the project's environmental impact. 42 U.S.C. 4332. See, *e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) (applying NEPA to the Rogue River Basin federal water project).

As this case illustrates, Congress and affected States may themselves specify and fund particular initiatives to address water quality issues. Congress has authorized the CERP, which sets out a comprehensive integrated approach, supported by extensive federal funding, to restore the South Florida ecosystem. See WRDA 2000 § 601(b), 114 Stat. 2680-2681. The CERP not only addresses the impact of excessive phosphorus on that ecosystem, but it also addresses a host of other problems that affect regional water quality. That integrated approach will ensure that the water quality concerns of the area are resolved in a comprehensive manner that takes account of both water quality and water quantity issues. Florida, for its part, has enacted the Everglades Forever Act, which also addresses the ecosystem problems comprehensively. That Act specifically establishes a state permitting system for C&SF Project structures that discharge into the Everglades Protection Area, including the S-9 pumping station. See p. 10, *supra*.

Against this backdrop of concerted federal and state action, the imposition of NPDES permitting requirements is unlikely to serve any useful purpose. The respondents' insistence on the imposition of Clean Water Act requirements designed to address distinctly different issues would ultimately misdirect governmental resources toward unnecessary or duplicative processes and potentially hinder the Everglades restoration process.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2003

## ADDENDUM

### Pertinent Provisions of The Clean Water Act

**Section 101, 33 U.S.C. 1251. Congressional declaration of goals and policy**

* * * * *

**(g) Authority of States over water**

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

**Section 301, 33 U.S.C. 1311. Effluent limitations**

**(a) Illegality of pollutant discharges except in compliance with law**

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

**Section 304, 33 U.S.C. 1314. Information and guidelines**

* * * * *

**(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution**

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title * * * information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

* * * * *

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

* * * * *

**Section 402, 33 U.S.C. 1342. National pollutant discharge elimination system**

**(a) Permits for discharge of pollutants**

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318 and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator deter-



mines are necessary to carry out the provisions of this chapter.

* * * * *

**Section 502, 33 U.S.C. 1362. Definitions**

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone

or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * * * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * * * *

(15)

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No. 02-626

In The
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF FOR THE LAKE WORTH DRAINAGE DISTRICT AND THE FLORIDA ASSOCIATION OF SPECIAL DISTRICTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF *AMICI CURIAE* | 1 |
| SUMMARY OF THE ARGUMENT | 5 |
| ARGUMENT | 7 |
| I. THE MOVEMENT OF WATER CONTAINING POLLUTANTS FROM ONE NAVIGABLE BODY OF WATER TO ANOTHER THROUGH A SURFACE WATER CONVEYANCE FACILITY OR STRUCTURE DOES NOT CONSTITUTE A "DISCHARGE OF A POLLUTANT" WHICH REQUIRES A SECTION 402 NPDES POINT SOURCE PERMIT PURSUANT TO 33 U.S.C. §1342 | 7 |
| CONCLUSION | 29 |

## TABLE OF AUTHORITIES

Page

CASES

*Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976) ..... 9

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001) ..... 9, 17, 29

*Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001) ..... 20

*Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993) ..... 14

*Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) ..... 9, 10, 17, 29

*EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976) ..... 22

*Kelly v. United States Environmental Protection Agency*, 203 F.3d 519 (7th Cir. 2000) ..... 29

*Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002) ..... 1, 17

*National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) ..... 9, 12

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... 7, 8, 9, 10, 28

*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ..... 11



## TABLE OF AUTHORITIES – Continued

Page

*United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) ..... 20

*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... 16

STATUTES AND LAWS

United States Codes

33 U.S.C. §1251 *et seq.* ..... 3

33 U.S.C. §1251(b) ..... 11

33 U.S.C. §1251(g) ..... 11

33 U.S.C. §1311(b)-(m) ..... 15

33 U.S.C. §1313(b) ..... 11

33 U.S.C. §1313(d) ..... 14

33 U.S.C. §1313(e) ..... 11

33 U.S.C. §1314(b) ..... 15

33 U.S.C. §1314(d) ..... 15

33 U.S.C. §1314(f)(2)(F) ..... 12

33 U.S.C. §1316 ..... 15

33 U.S.C. §1316(a)(2) ..... 15

33 U.S.C. §1316(b)(1)(A) ..... 15

33 U.S.C. §1319 ..... 29

33 U.S.C. §1329 ..... 11

33 U.S.C. §1342 ..... 29

33 U.S.C. §1362(6) ..... 13

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. §1362(12) ..... 3, 7, 9

33 U.S.C. §1362(14) ..... 13, 24

FEDERAL LAWS

Federal Water Pollution Control Act of 1972 (Clean Water Act)

Section 303(d) ..... 14, 25

Section 306 ..... 15

Section 319 ..... 11

Section 402 ..... *passim*

FLORIDA STATUTES

Chapter 298 ..... 1

Chapter 373 ..... 11

Section 373.453 *et seq.* ..... 11

Chapter 403 ..... 11

Section 403.067 ..... 11, 13, 23

Chapter 403, Part I ..... 11

Chapter 403, Part VI ..... 12

FLORIDA LAWS

Florida Air and Water Pollution Control Act ..... 11

Florida Environmental Re-organizational Act of 1993 (Chapter 93-212, Laws of Florida) ..... 11

Florida Safe Drinking Water Act ..... 12



TABLE OF AUTHORITIES – Continued

Page

Florida Water Resources Act of 1972 ..... 11

Florida Watershed Restoration Act of 1999 ..... 11

Surface Water Improvement and Management Act of 1987 ..... 11

RULES

Florida Administrative Code

Chapter 62-620 ..... 16

Chapter 62-650 ..... 22

Rule 62-4.242 ..... 22

Rule 62-302.300 ..... 22

Rule 62-650.200 ..... 22

OTHER AUTHORITIES

*A Report to the Governor and the Legislature on the Allocation of Total Maximum Daily Loads in Florida, date February 1, 2001*, Florida Department of Environmental Protection ..... 26

*EPA, The Control of Pollution Caused by Hydrographic Modifications* (1973) ..... 12

E Sciences, Inc., *National Pollutant Discharge Elimination System Permitting Analysis for the Lake Worth Drainage District* (September, 2003) ... 4, 24, 27

*Methodology for TMDL Preliminary Cost Analysis*, City of Tallahassee, Stormwater Management Division (2001) ..... 26

TABLE OF AUTHORITIES – Continued

Page

Senate Report No. 92-414, The Federal Water Pollution Control Act Amendments of 1971, Report of the Committee on Public Works .....14, 15

*The Clean Water Act Handbook*, Second Edition (Mark Ryan, ed.2003).....23



## INTEREST OF *AMICI CURIAE*

*Amici curiae*,[1] Lake Worth Drainage District ("LWDD") and the Florida Association of Special Districts ("FASD"), submit this brief in support of the Petitioner, South Florida Water Management District ("SFWMD"), seeking reversal of the decision of the Eleventh Circuit Court of Appeals in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).

In Florida today there are more than one thousand independent and dependent special districts, governed by more than 30 statutes and involving over 500 local governments. Special districts have a long history in the State of Florida and all were created in order to provide specific government services to a target population. Included among Florida's special districts are 96 water control districts and five water management districts.

FASD, a Florida Corporation, is an association consisting of 89 special districts in the State of Florida, including 39 of the State's water control districts. LWDD, a member of FASD, is an independent taxing district of the State of Florida created on June 15, 1915. The District currently operates pursuant to special legislative act and Chapter 298, Florida Statutes. LWDD encompasses approximately 218 square miles in southeastern Palm

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief. Written consent to file this brief has been obtained from all parties.

Beach County, Florida. It includes within its boundaries 11 municipalities, 20,000 acres of agricultural land and is bordered on the west by the Arthur R. Marshall Loxahatchee National Wildlife Refuge, otherwise known as Water Conservation Area #1 ("WCA-1").

LWDD was created for the purpose of reclaiming the lands within its boundaries for agriculture and other types of development and for the purpose of water control and water supply through the construction and maintenance of canals, ditches, water control structures and pumping stations. Its water management system provides comprehensive flood control and water supply protection to over 700,000 residents, 20,000 acres of prime agricultural land and 120,000 acres of urban development. It does this by maintaining approximately 511 miles of canals, 20 major water control structures and numerous other minor structures. The district's flood control discharges are through control structures (pumps, weirs and dikes) to discrete water bodies such as Lake Worth Lagoon (a part of the Intracoastal Waterway) and the Hillsboro Canal, which are outside the boundaries of the LWDD system, as well as a number of lakes which are within its boundaries. The system is also operated to provide groundwater recharge and for the prevention of salt water intrusion. LWDD relies for its water supply on deliveries from the U. S. Army Corps of Engineers' Central and Southern Florida Flood Control Project (C&SFCP), primarily WCA-1, which is separated from the LWDD system by a dike and control structures. The District utilizes this water supply to maintain canal levels that recharge public water supply well-fields, to prevent salt water intrusion and to provide irrigation to a vital agricultural area in Palm Beach County. LWDD's canal system constitutes the receiving



waters for much of southeast Palm Beach County's stormwater runoff. LWDD is the largest water control district in the State of Florida.

LWDD is one of 19 water control districts located within Palm Beach County alone. All of these districts utilize various major and minor water control structures such as pumps, spillways and canals which meet the definition of "point source" found in the Clean Water Act ("CWA"). 33 U.S.C. §1251 *et seq.*; *see* 33 U.S.C. §1362(14). These districts serve both agricultural and urban needs. For example, there is the South Florida Conservancy District ("SFCD"). This water control district is located in the Everglades Agricultural Area south of Lake Okeechobee. The district's structures, in this case pumps, provide the SFCD with the opportunity to withdraw water from Lake Okeechobee for agricultural water supply needs. Likewise, these pumps provide the district with the opportunity to discharge excess water from its geographic boundaries to Lake Okeechobee for flood control purposes. The district is equipped with pumps on its southernmost boundary from Lake Okeechobee which allows it to pump and discharge water from the Hillsboro and North New River Canals to the south. In addition, the SFCD is served by the S-236 pump station on the southern border of Lake Okeechobee.

Another example is the Northern Palm Beach County Improvement District ("NPBCID") which services an urban area. This water control district is located in the northeastern portion of Palm Beach County and extends to the county's boundary with Martin County to the north. The NPBCID is comprised of separate parcels separated by levees. Each parcel is equipped with pumps that allows it to withdraw or discharge water over district levees into

either the C-17 or C-18 canals operated by SFWMD, which are navigable waters of the United States.

Districts such as LWDD, NPBGID and SFCD are subject to various permits (*e.g.*, diversion and impoundment, surface water management) issued and monitored by the State's water management districts. None of these water control districts, however, has ever been required to obtain a Section 402 National Pollution Discharge Elimination System ("NPDES") point source permit to operate. Under the holding of the Eleventh Circuit's decision below, and the broad language utilized in that holding, the question, and concern, is raised whether the LWDD and the FASD's water control district members will be required to obtain Section 402 point source permits for each of their water control structures which merely transfer water from one navigable body of water to another.

The impact of the Eleventh Circuit's decision on such water control districts is enormous. In an attempt to quantify that potential impact, LWDD has conducted an evaluation of the consequences of its being made subject to the NPDES point source permitting requirements for all of its structures which could be deemed point sources of discharge. The evaluation, contained in a report reviewing LWDD's system and the most likely permitting scenarios,[2] demonstrates an extensive, burdensome and expensive regulatory process. Neither the language of the CWA nor its legislative history supports a finding that Congress

[2] E Sciences, Inc., *National Pollutant Discharge Elimination System Permitting Analysis for the Lake Worth Drainage District* (September, 2003).



intended such a requirement for water control and water management districts that receive waters into their own navigable water bodies, add no pollutants and act as a conduit of surface water runoff to other navigable bodies as part of a flood control and water supply protection system. Should the Eleventh Circuit's decision be upheld, the scenario outlined below as it affects LWDD would be multiplied thousands of times over throughout the State of Florida and the country as a whole.

## SUMMARY OF THE ARGUMENT

The decision below, requiring as it does a Section 402 NPDES permit when water containing pollutants is transferred through a point source from one navigable body to another, is contrary to the express intent of Congress in passing the Clean Water Act. Congress identified the purpose of point source permits as being directed at industrial and municipal waste dischargers of pollutants in order that such pollutants could be addressed at their source. It further expressed its intent to recognize, preserve and protect the primary responsibilities and rights of states with regard to the use of land and water resources.

The decision below is in conflict with this Congressional intent as well as previous decisions of the Fourth, Sixth, and the District of Columbia Circuits. If permitted to stand, it will have a significant impact on *amici curiae* and other similarly situated governmental water control and water management districts in the State of Florida as well as across the country, requiring applications for multiple NPDES point source permits. This is contrary to

long-standing policies and procedures and in conflict with the federal/state system of preventing and reducing pollution set out in the CWA. An analysis of the potential cost to LWDD of being subjected to the NPDES point source permitting program suggests that the cost of implementation of such permits, *i.e.*, the need to meet discharge standards, is likely to be in the hundreds of millions of dollars. Such enormous costs cannot be justified, and demonstrate that Congress could not have intended such, where LWDD merely moves waters with pre-existing pollutants (at the time it receives the surface waters and stormwater), which have already been previously permitted through the NPDES permitting process.

The CWA establishes respective federal and state responsibilities for water quality. It retains within the states the responsibility for flood control, water quantity management and regulation, land use and the like. The Eleventh Circuit's strict "but for" test requiring Section 402 NPDES permits in circumstances such as those presented here and applying that requirement to water control and water management districts, would result in the broad and unwarranted expansion of federal regulation of activities Congress intended to remain with the states and which are otherwise regulated through both federal and state programs. For these reasons the decision below should be reversed.



## ARGUMENT

### I. THE MOVEMENT OF WATER CONTAINING POLLUTANTS FROM ONE NAVIGABLE BODY OF WATER TO ANOTHER THROUGH A SURFACE WATER CONVEYANCE FACILITY OR STRUCTURE DOES NOT CONSTITUTE A "DISCHARGE OF A POLLUTANT" WHICH REQUIRES A SECTION 402 NPDES POINT SOURCE PERMIT PURSUANT TO 33 U.S.C. §1342.

The impact of the Eleventh Circuit's expansive "but for" interpretation of the "addition . . . from" element set forth in 33 U.S.C. §1362(12) which would require an NPDES permit to transfer surface water or stormwater from one navigable body to another, is starkly demonstrated by a review of the requirements it would place on LWDD, the dozens of other water control districts in the State of Florida and the five water management districts, including SFWMD. It is a review of the impacts on these types of entities which also vividly demonstrates that the Eleventh Circuit's interpretation is not what Congress intended in the distinctions it made between point source and non-point sources of pollutants and pollution.

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the Circuit Court of Appeals for the District of Columbia accepted the argument of the Environmental Protection Agency ("EPA") "that for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world . . . " *Id.* at 165. As a result, despite dam-induced water quality changes in water which is then transferred from the reservoir to the downstream river, it was held that an NPDES point source permit was not

required because this did not constitute the "addition" of pollutants into a navigable body of water. In arriving at its conclusion the D.C. Circuit engaged in a lengthy and exhaustive analysis of the CWA's legislative history to discern the intent of Congress. *Id.* 171-182. Among the D.C. Circuit's findings regarding Congressional intent were the following:

> 1. With respect to NPDES point source permitting, Congress' focus was on traditional industrial and municipal wastes, not how to regulate facilities such as dams transferring water (and pollutants) from upstream water to downstream water (*Id.* at 175);
>
> 2. It did not appear that Congress intended to apply the NPDES point source permitting system wherever feasible (*Id.* at 176);[3]
>
> 3. Congress made clear and precise distinctions between point sources, which would be subject to direct federal regulation under the CWA, and non-point sources, the control of which was specifically reserved to state and local government.

As a result the court in *Gorsuch* interpreted the "addition" criterion as requiring the pollutant to be introduced into the navigable waters from the "outside world." This decision was consistent with the previous determination by the Fourth Circuit Court of Appeals that "[t]hose

[3] "Had it wanted to do so, [Congress] could easily have chosen suitable language, *e.g.*, 'all pollution released through a point source.' Instead, as we have seen, the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source." (*Id.* at 176)



constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass." *Appalachian Power Company v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976). This reasoning was subsequently followed in *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Circuit 1988) (where a hydro-electric facility's release of turbine generating water containing entrained fish, a pollutant created by the normal operation of the facility, into Lake Michigan (from where the water and fish originally entered the reservoir) was held not to constitute the "addition" of pollutants so as to require an NPDES permit).

Relying on the First and Second Circuit decisions in *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001), and without any discussion of the legislative history of the CWA and Congressional intent, the Eleventh Circuit, in the case under review, rejected the *Gorsuch* court's interpretation of 33 U.S.C. §1362(12).[4]

The decision below imposes a strict "but for" test for determining whether the NPDES point source permitting process applies to transfers of water from one navigable body of water to another. It basically establishes four criteria:

[4] While the decision below could be viewed as attempting to limit *Gorsuch* to its specific facts, *i.e.*, applying only to dams, there is nothing in the *Gorsuch* opinion itself that purports to limit its holding or its reading of the legislative history as such.

1. In determining whether pollutants are added to navigable waters from the outside world for purposes of the CWA, the receiving body of water is the *only* relevant body of navigable water;

2. For an addition of pollutants to navigable waters to require a Section 402 permit, the addition must be from a point source;

3. For an addition of pollutants to be from a point source, the relevant inquiry is whether, *but for* the point source, the pollutants would have been added to the receiving body of water (*Id.* at 1368); and

4. The addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into the receiving navigable body of water.

In addition, the Eleventh Circuit concluded that a point source does not have to be the original source of the pollutants. Rather, it "can . . . indicate the 'agent or instrumentality' or the 'cause or reason' by which the pollutants are added to navigable waters." *Id.* at 1368, n.6. The Eleventh Circuit's ultimate conclusion, then, is that the transfer of water from a navigable body which contains pollutants (as that term is defined in the CWA) through a point source, which itself does not add any pollutants to the water, to another navigable body necessarily requires the obtaining of a Section 402 NPDES permit.

The distinction between point source pollutants and non-point source pollution is neither academic nor insignificant. While, as noted in *Gorsuch*, Congress intended the NPDES program to play a major role in accomplishing the purposes of the CWA, the regulatory



scheme provided that it remained up to the states to address non-point sources of pollution. 33 U.S.C. §§1313(b) and (e), 1329. In 1987, Congress added Section 319 of the CWA (33 U.S.C. §1329) creating a three stage non-point source management program requiring states to develop non-point source assessment reports, non-point source management programs and phased in implementation of those programs with the assistance of federal funds. Section 319, through making available federal funds to states and local governments, encourages states to implement best management practices to address non-point source pollution problems. However, non-point source pollution remains within the states' realm of responsibility.

The express policy of the Congress is to recognize, preserve and protect the primary responsibilities and rights of states not only to prevent and reduce pollution but to plan the development and use of land and water resources and to allocate quantities of water within their jurisdictions. 33 U.S.C. §1251(b) and (g). This Congressional intent was expressly noted and deferred to by the Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

The State of Florida has enacted a number of water quality statutes including the Florida Water Resources Act of 1972 (Chapter 373, Florida Statutes), the Florida Environmental Re-organizational Act of 1993 (Chapter 93-212, Laws of Florida), the Surface Water Improvement and Management Act of 1987 (Florida Statutes, Section 373.453 *et seq.*), and the Florida Watershed Restoration Act of 1999 (Florida Statutes, Section 403.067). *See also* Florida Statutes, Chapter 403, Part I (the Florida Air and

Water Pollution Control Act) and Part VI (the Florida Safe Drinking Water Act). In the State of Florida, the primary agencies for enforcing the State water quality laws and exercising the State's rights and responsibilities under the CWA are the Florida Department of Environmental Protection (FDEP) and the water management districts. Water control districts, such as LWDD, which are permitted by water management districts, play a crucial role in the implementation of these plans and responsibilities.

To impose upon these water management entities the requirement of a Section 402 NPDES permit every time water is transferred through a point source from one navigable body to another would place an unbearable burden on these districts, would interfere with the State's management of these resources and would, in essence, preempt, by judicial fiat, the express intent of Congress. Under the holding of the decision below, any transfer of water from one body to another that introduces an already existing pollutant would require an NPDES point source permit. This is so even in those situations, as with the S-9 pump station, where the two bodies of water would be one but for a man-made structure which separates them. The changes to the movement, flow or circulation of these navigable waters caused by the construction of man-made structures or flow diversion facilities, are intended to be and have been controlled by the states under non-point source procedures and methods developed with guidance from the EPA. 33 U.S.C. §1314(f)(2)(F); *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580, 588 (6th Cir. 1988); *see also EPA, The Control of Pollution from Hydrographic Modifications* (1973).

Just as the SFWMD does, LWDD and the other water control districts in the State receive water which can, and



most often will, contain pre-existing pollutants[5] which were naturally occurring or added from other sources upstream. These waters are then transferred through structures, which meet the definition of "point sources", into other navigable bodies of water without the addition of any new pollutants or, in the case of, for example, agricultural operations, the addition of pollutants from exempt activities. *See* 33 U.S.C. §1362(14). Under the expansive language of the decision below, a Section 402 NPDES permit would be required at each point source where such a transfer occurs. This would, for all intents and purposes, usurp the State's role in the overall management of its water resources.

For a water control district such as LWDD, a requirement to obtain an NPDES point source permit for its movement of water from one navigable surface water body to another would impose significant financial and operational burdens. LWDD, which has a large number of water control structures and moves water to and from a number of navigable bodies, is required to obtain a diversion and impoundment permit from SFWMD. Landowners within the district who discharge into the district's canals may also be subject to the extensive total maximum daily load ("TMDL") program regulatory requirements of Section 403.067, Florida Statutes, which address surface waters that do not meet the State's water quality standards. This

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[5] "Pollutant" is defined in 33 U.S.C. §1362(6) as meaning "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

provision of Florida law, addressing both point source pollutants and non-point source pollution, is a state program in accordance with the planning requirements of Section 303(d) of the CWA. 33 U.S.C. §1313(d).

To now impose the additional regulatory requirement of obtaining an NPDES point source permit for the transfer of water from one body to another would place LWDD and other water control districts in the position of not only having to engage in a separate and costly permitting process, but of potentially having to treat water at each point source to remove already existing pollutants. And, at least based on the Ninth Circuit's view, this would be the case even where there is no net increase in the level of pollutants in the receiving body of water. *See, Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993). The point source/non-point source regulatory system created by the CWA and its implementation by the state and federal governments militate against the Eleventh Circuit's expansive view of the NPDES point source permitting process and the inordinate and unwarranted regulatory burden it would place on state and local water management and water control entities.

That NPDES point source permits were not intended by the Congress to apply to the transfer of surface water and stormwater from one navigable body to another is readily apparent from a review of the legislative history and the actual implementation of the NPDES point source permitting process, at least in the State of Florida. Senate Report No. 92-414, The Federal Water Pollution Control Act Amendments of 1971 Report of the Committee on Public Works, discusses in significant detail the legislative intent behind the CWA including the reasons for, and the



nature of, the permit system addressing the discharge of pollutants into the country's navigable waters. In the discussions regarding point sources, and the need to regulate the discharge of pollutants from point sources, it is abundantly clear that the focus is on *industrial and municipal waste* point sources, *i.e.*, controlling the discharge of pollutants at their original source. For example, in establishing federal standards of performance for the control of the discharge of pollutants from "new sources"[6] under Section 306 of the CWA (33 U.S.C. §1316), the Congress specifically listed twenty-eight specified *industries* which "must be constructed to meet a standard that reflects the greatest degree of effluent reduction that can be achieved by use of the latest available control technology." Senate Report No. 92-414, Section 306. The entire list contained in 33 U.S.C. §1316(b)(1)(A) consists of industrial and manufacturing endeavors. There are no categories which even remotely resemble a water control district.[7]

Throughout the remainder of the Senate Report all references to point source discharges of pollutants reflect the Senate's intent to control industrial and municipal waste discharges at their source, *i.e.*, at their *original*

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[6] The term "new source" is defined as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. §1316 (a)(2).

[7] *See also* 33 U.S.C. §1311(b)-(m) (addressing effluent limitations for different categories of point sources) and 33 U.S.C. §1314(b) and (d) (addressing levels of treatment required for industrial and municipal waste point sources).

source. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-133 (1985). Neither in this Senate Report nor in any other part of the legislative history of the CWA that *amici curiae* have discovered is there any indication of Congress' intent to regulate the transfer of surface water and stormwater from one navigable body to another by water control districts or water management districts through the Section 402 NPDES permitting program. Indeed, it would be a significant stretch to classify the LWDD or any other similar entity as an industrial or municipal waste operation or endeavor.

The permit application process itself lends additional authoritative data to this view of Congress' intent. In Florida, the Section 402 NPDES permit program has been delegated by EPA to the FDEP. The forms utilized by FDEP in this permitting process demonstrate that the enforcing agencies have not interpreted the CWA as requiring, and have not contemplated, the applicability of Section 402 NPDES permits to water control districts and water management districts transferring surface waters and stormwater from and to navigable waters, even through point sources. Wastewater Facility or Activity Permit Application Form 1 (App. 1-24) identifies the group of forms, in addition to this general form, which are necessary to apply for a permit for a wastewater facility or activity under Chapter 62-620, Florida Administrative Code. There are eight specific forms identified in Application Form 1. (App. 1-2) The only form which could arguably be applicable to the LWDD or other water control or water management districts, is Form 2F. That form is entitled "Permit to Discharge Stormwater Associated with Industrial Activity." (App. 25-54) Once again, the intent that NPDES point source permits do not apply, and have



never been meant to apply, to the movement of water for water control and management purposes is manifest. It is no accident that for almost thirty (30) years such permits had not been required of governmental entities that transferred surface waters from one navigable body to another. The language of the CWA, its legislative history, the regulatory agencies' application of the law and, until *Dubois*, *Catskill Mountains* and *Miccosukee Tribe of Indians*, the applicable case law established the non-applicability of Section 402 to such activities.

LWDD has evaluated the impact of the Eleventh Circuit's decision in *Miccosukee Tribe of Indians* on its operations and budget. It presents a case study on the enormous cost locally and nationwide which would be imposed by the Eleventh Circuit's strict "but for" test for requiring NPDES permits and demonstrates that the Eleventh Circuit's reading of this portion of the CWA could not be what Congress intended.

LWDD is not an industrial plant, a publicly owned treatment works (POTW) or a municipal separate storm sewer system (MS4). It engages in no industrial activity, treats no wastewater and, in the course of its operations, introduces no pollutants into any of the waters under its control. As previously noted, LWDD is a water control district which operates a water management system providing comprehensive flood control and water supply protection. It is basically in the business of collecting and moving water.

The LWDD consists of four separate basins. The entire system consists of 17 major discharge structures, 13 minor discharge structures, 56 aluminum or wood risers/gates and 14 sheet pile weirs. The LWDD is bordered on the

west by the SFWMD L-40 canal which separates the LWDD from WCA-1.

Its main source of water is WCA-1. Its canal system is actually the receiving waters for much of Palm Beach County, which is a regulated, NPDES permitted, Phase I MS4 county. Phase I permits require all outfalls to waters of the United States to have been identified and both structural and non-structural Best Management Practices (BMP) to have been implemented for the purpose of improving the water quality of the receiving waters. Thus, LWDD, whose waters are waters of the United States (*see amici curiae*'s Brief in Support of Petition for Writ of Certiorari, App. 1-19) is receiving NPDES permitted water.

The district's basins are defined by the direction of water flow. Surface/stormwater is contained within each basin, directed towards canals and, when necessary, discharged. The four basins are the C-51 basin, the C-16 basin, the C-15 basin and the Hillsboro basin.

**C-51 Basin** – The C-51 Basin is approximately 65 square miles in size. It is the northernmost basin in the LWDD. The C-51 canal (also known as the West Palm Beach Canal) is the major collector of flow for the basin. There are also 12 main lateral canals (L-1 to L-12) and 5 equalizing canals (E-1, E-2E, E-2W and E-3 and E-4). Water is directed from the lateral canals to the equalizers to the C-51 which discharges into the Intracoastal Waterway (ICWW), a navigable body outside the boundaries of the LWDD. There are 3 control structures south of the C-51 canal that discharge and maintain water levels. These structures are known as the CS-2, CS-4 and CS-6. Along



its western border with the L-40 canal there is a gravity-fed culvert that connects the LWDD L-23W canal with WCA-1 at the SFWMD G94-C control structure. The L-23W canal flows east to the E-1 equalizing canal and then south into the L-30 lateral canal in the C-15 Basin from which water is discharged by control structure CS-11.

**C-16 Basin** – The C-16 Basin is approximately 65 square miles in size. It consists of 15 lateral canals (L-13 to L-27) and 4 equalizing canals (E-2W, E-2E, E-3 and E-4). Flow in this basin is directed to the Boynton Canal, the L-14 or the E-4. The E-4 is a partially natural channel that runs through Lake Osborne, a navigable body within the boundaries of LWDD. The L-14 discharges into the E-4. E-4 and Boynton Canal discharge into the SFWMD C-16 which discharges into the ICWW. There are two control structures to discharge and maintain water levels known as the CS-8 and the CS-9.

**C-15 Basin** – The C-15 Basin is approximately 55 square miles in size. It consists of 15 lateral canals (L-28 to L-42) and 5 equalizing canals (E-1, E-2W, E-2E, E-3 and E-4). The L-30, L-38, and E-4 canals are major collectors. Flow from the L-30 is directed to the E-4, which is partially a natural channel that runs through Lake Ida, a navigable body within the boundaries of LWDD. The E-4 and L-38 discharge to the ICWW through the SFWMD C-15 canal, which is the eastern extension of the L-38 canal. There are two major control structures that discharge and maintain water levels, known as the CS-11 and CS-12.

**Hillsboro Basin** – The Hillsboro Basin is approximately 60 square miles in size. It contains 9 lateral canals (L-42 to L-50) and 6 equalizing canals (E-1W, E-1, E-2W, E-2E, E-3 and E-4). The equalizing canals discharge to the

SFWMD's Hillsboro Canal which then discharges to the ICWW. There are 10 control structures to discharge and maintain water levels known as the CS-1, CS-3, CS-14, CS-15, CS-16, CS-17E, CS-17N, CS-17W, CS-19 and CS-20.

It bears repeating that the LWDD system includes 17 major discharge structures, 13 minor discharge structures and scores of risers/gates and weirs. All of the canals in the LWDD are navigable bodies of water. Given the language of the CWA and the broad interpretation EPA and the courts[8] have given to the definition of "point-source," all of LWDD's structures could be considered point sources. And given the Eleventh Circuit's decision, the LWDD structures have the potential to discharge pollutants to navigable waters because a) any of the structures could theoretically separate waters of different quality (*e.g.*, a weir can cause upstream water to be stagnant), b) there are a number of potential land sources of pollution (non-point sources) within LWDD that contribute to the generation of pollutants, and c) LWDD's canals have been determined to be navigable waters.

Most surface waters (waters of the United States) contain pollutants. If, as the Eleventh Circuit has now held, simply passing that water through a drainage structure to another surface water could be considered the "addition of pollutants" as set forth in the CWA, thus requiring an NPDES point source permit, it is likely that

[8] *See, e.g., United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979); *Colvin v. United States*, 181 F. Supp. 2d 1050, 1056 (C.D. Cal., 2001).



most drainage control structures would be subject to permitting. Therefore, based on this overly expansive view of the concept of discharge, every LWDD structure could require a permit.

Historically, the EPA and the State of Florida have not required permits from systems such as the LWDD. However, when drainage systems contain stormwater treatment, the State has required permitting either through the NPDES MS4 program or the NPDES industrial wastewater program. Indeed, treatment, usually at the point of discharge, is a key component of the point source permitting process.

While theoretically each and every LWDD structure could be required to obtain an NPDES point source permit, due to the interconnected nature of the LWDD system and assuming a permitting effort to be focused on improving the quality of discharge, LWDD has, for purposes of this discussion, anticipated that permits would be issued for each of the four basins within the district. The potential scenario, then, would be that permits would be issued for the C-51, C-16, C-15 and Hillsboro Canal basins. And since LWDD is not a municipal separate storm sewer system, it would appear that following the lower court's decision the NPDES industrial program, rather than the MS4 program, would be the permitting process LWDD would be subjected to.

While point source dischargers' performance is intended under the NPDES program to be measured by

strict technology-based effluent limitations,[9] given the nature of LWDD and other water control systems (*i.e.*, non-industrial, non-municipal waste dischargers), treating LWDD's transfer of water through its control structures as point source discharges in the permitting process would require the district to meet traditional State criteria establishing a discharge standard for the particular system. In establishing the discharge standard LWDD would need to address at least three items.

1. LWDD would need to meet Water Quality Based Effluent Limitations (WQBEL) as that process is defined in Chapter 62-650, Florida Administrative Code. WQBELs establish effluent limits that a discharger must meet to protect the water quality of the receiving water body. The goal is to establish the quality of discharge necessary to protect the receiving water body and the effluent limit is based on protecting the surface water rather than being a level of treatment that technology can readily meet. *See* Rule 62-650.200, Florida Administrative Code.

2. A cause or contribute analysis must also be done to demonstrate that the discharge at issue does not cause or contribute to the failure of the receiving surface water to meet all water quality criteria at all times.

3. LWDD would also be required to comply with the anti-degradation requirements of rules 62-4.242 and 62-302.300, Florida Administrative Code, prohibiting the lowering of water quality that is above criteria unless the proposed discharge is necessary or desirable under federal

[9] *See EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204-205 (1976).



standards and are clearly in the public interest. Lowering of water quality below applicable criteria is deemed to be not in the public interest and will not be permitted.

In addition, Florida is in the process of implementing a Total Maximum Daily Load (TMDL) program pursuant to Section 403.067, Florida Statutes. A TMDL is the total pollutant loading allowed into a water of the United States that will not cause the water body to violate water quality standards.[10] Integral to the State's TMDL program is the requirement to address pollutant load reduction goals through effluent limitations in NPDES permits. The TMDL for any water body includes point and non-point source loading, natural background loading and a margin for error.

The Section 402 NPDES permit process also involves an extensive water quality monitoring program. Traditionally included is a review of the industrial process involved in the generation of the pollutants being discharged. This component of the review is not particularly well-suited to the non-point discharges that would contribute pollutants to the LWDD system. As previously noted, the LWDD's canal system is actually the receiving waters for much of Palm Beach County. Almost fifty percent of the area located within the LWDD's boundaries is urban and is already the subject of the BMPs of a Phase I MS4 permit. Pollutant generation within the LWDD is likely to depend upon land uses which generally consist of

[10] For an overview of TMDLs *see The Clean Water Act Handbook*, Second Edition (Mark Ryan, ed. 2003) (a publication of the American Bar Association Section of Environment, Energy and Resources).

mixed residential, including high density properties such as apartments, commercial and some rural property. Residential properties can contribute significantly to non-point source pollution through stormwater runoff from yards that can include vegetation (*e.g.*, grass clippings), herbicides, pesticides, fertilizers and general debris. Commercial property can be a source of both point and non-point source pollution, although most point sources would be expected to already be regulated under NPDES. Non-point sources would include oil and grease from roads and parking lots, pesticides, herbicides, fertilizers and general debris. Rural areas can be a significant source of nutrients from agricultural operations (*e.g.*, phosphorus) which are specifically exempt from the definition of point sources. *See* 33 U.S.C. §1362(14).

To determine a potential cost for obtaining NPDES point source permits, LWDD looked at monitoring costs, additional software and system costs (*e.g.*, the development of a geographic information system), enhanced data management costs, permit application fees, application development costs and permit implementation costs. Excluding permit implementation, it is estimated that the additional costs to LWDD, including the permit renewal fees at the end of the five year permit would range from $238,000 to $274,000. (E Sciences Report, n.2. *supra)* However, by far, the greatest element of cost is permit implementation.

Given the goals and the function of the NPDES point source permit program, it must be assumed that the process would require meeting State water quality criteria. At present, LWDD provides water quantity control only. The prospect of requiring water quality treatment through a Section 402 NPDES permit would, in effect,



require the wholesale retrofit of a large portion of Palm Beach County. While the total cost of compliance could possibly be shared with the permitted MS4, as well as other point source dischargers into the system, at present it is not possible to distinguish between those sources for the determination of a pro rata share. In any event, the overall cost of compliance is sure to be significant.

In 1998, Florida identified water bodies for which the ambient water quality did not meet established standards pursuant to Section 303(d) of the CWA. Such waters are considered impaired and are potential candidates for the implementation of a TMDL process. According to the 1998 303(d) list, three of LWDD's four basins discharge to impaired waters. The fourth basin (C-15) has three listed lateral canals and due to the interconnected nature of the system would likely need to meet established TMDLs as well.

As previously noted, in establishing the discharge standard LWDD would need to address in the point source permit program, the district would need to meet traditional criteria, including WQBELs. It is difficult to specifically quantify the costs of plan implementation at the present time in the absence of the presentation of relevant data to the regulating agencies as well as the absence of discharge standards promulgated by the agencies for the non-industrial LWDD. There is, however, an analogy that can be made to the cost of implementing TMDLs since, arguably, WQBELs are nothing more than TMDL requirements imposed on a point source basis.

A cost analysis for retrofitting urban watersheds based on meeting TMDL requirements was included in a study done for the City of Tallahassee.[11] Applying this analysis to the establishment of discharge standards through the utilization of WQBELs and anti-degradation criteria does provide us with a scope of the potential costs of Section 402 NPDES permit implementation for LWDD.

The specific details of TMDL allocation procedures are outlined in a document prepared by FDEP and titled A *Report to the Governor and the Legislature on the Allocation of Total Maximum Daily Loads in Florida, date February 1, 2001.* The initial allocation process would first calculate the amount of pollutant reductions that would be achieved if 45% of all agricultural and silvicultural operations implemented the appropriate BMPs, 45% of all urban areas met stormwater treatment requirements for new construction and 45% of homes with septic tanks within the one hundred year flood plain were hooked up to a regional sewer system. If the reductions obtained are not sufficient to meet the TMDL then the same calculations are done at a level of 90%. If the reductions are still insufficient to meet the TMDL, reductions are to be allocated to sources in increments of 10% until the TMDL is met. Based on calculating the cost of compliance by multiplying the acreage in the LWDD requiring treatment to achieve either the 45% or 90% treatment standard by the cost of treatment per unit area (based on available data), the range of the estimated cost of complying with Section 402 NPDES permits for the discharge of water

[11] *Methodology for TMDL Preliminary Cost Analysis*, City of Tallahassee, Stormwater Management Division (2001).



through LWDD's control structures (*i.e.*, its point-sources) would be between 424.5 million and 849 million dollars. (E Sciences Report, n.2, *supra*) And while these costs are approximate and based upon several assumptions, it should also be noted that costs would increase should the described level of treatment in the first two steps (*i.e.*, at 45% and 90% levels) not be adequate to achieve the desired result.

The relevance of this cost analysis, even if rough and approximate, is readily apparent. First, if the range of costs were even only one-fourth of this estimate, the burden would be extraordinary on a district (LWDD) with an annual budget of approximately 12 million dollars. Second, LWDD is only one of approximately one hundred water control and water management districts located in the State of Florida and one of thousands located in the country, many of which have much smaller budgets and much less capability to handle such permit implementation costs. The cost of requiring Section 402 NPDES permits for every point source that merely transfers water from one navigable body to another would be astronomical. Third, these astronomical costs would be imposed on governmental bodies whose function it is to move and manage water for a variety of water quantity reasons (flood control, irrigation, public drinking, water supply, etc.) and who have added *no* pollutants to the water from their receipt of it to their transfer of it. Fourth, this astronomical cost would be imposed by the federal government on state and local governments through an expanded definition of point source discharge (*i.e.*, "addition" of pollutants) which, for all intents and purposes, would usurp the states' retained (under the CWA) rights and responsibilities when it comes to water management.

Finally, the potential astronomical cost of requiring a Section 402 NPDES permit for every structure which transfers water from one navigable body of water to another without the introduction of additional pollutants is itself, standing alone, strong evidence that Congress did not intend NPDES industrial permits to apply to this situation.

Ultimately, the Eleventh Circuit's decision is counterproductive to the goal of clean water. Its focus on regulating the movement of water within or among navigable bodies is a misguided diversion. Through *true* point source industrial discharge permits, non-point source processes and permits, TMDLs and the establishment of state water quality criteria, the focus is more appropriately on addressing and treating pollution and pollutants at their source rather than in the course of their travels within unitary or connected waters of the United States. If Congress had intended otherwise it would simply have prohibited the transfer of any waters containing any pollutants through any point sources without the qualification of an "addition" of pollutants to the navigable waters of the United States. This Congress did not do, deciding, as it did, that cost was a factor to be taken into account in establishing effluent limits. *National Wildlife Federation v. Gorsuch*, *supra* at 178, n.65.

Historically, EPA has never required LWDD or other water control districts to obtain an NPDES point source permit to transfer water from one navigable body to another. Surface water management systems have been established and flood control projects constructed under state water management programs utilizing the non-point source permitting processes to address water quality issues in such circumstances. Nothing has changed by way



of Congressional enactment to modify that process. In essence, the Eleventh Circuit's extension of the NPDES industrial point source permit process, expanding on cases such as *Dubois* and *Catskill Mountains*, is tantamount to amending the Clean Water Act, a process not properly within the ambit of judicial authority.

It is to be recalled that there are significant civil and even criminal penalties for violating the CWA.[12] As it is, with regard to the civil penalties under the Act, CWA is a strict liability statute. *See Kelly v. United States Environmental Protection Agency*, 203 F.3d 519, 523 (7th Cir. 2000) (and cases cited therein). If it was the intent of Congress that water control and water management districts such as LWDD were required to obtain NPDES point source permits, thereby incurring potential costs as outlined herein, and further subjecting such districts to strict liability civil penalties and the potential criminal penalties (for negligent or knowing violations), then it is incumbent upon the Congress to make that intent manifest and clear. Despite the Eleventh Circuit's determination to the contrary (without any discussion of Congressional intent), Congress has not done so.

## CONCLUSION

The decision below expands the reach of the NPDES industrial point source permitting program far beyond its historical application and in a manner not supported by

[12] *See* 33 U.S.C. Sections 1319, 1342.

either the language of the Clean Water Act or its legislative history. Water management and water control districts such as those represented by *amici curiae* have not previously been required to obtain NPDES industrial point source permits for the mere movement of water within their own systems or between their own navigable water bodies and others. To require such permitting would impose an inordinate burden, operationally and financially, on such districts without any showing of an appreciable improvement in overall water quality. This was not the intent of Congress in passing the Clean Water Act and in requiring permits for the industrial discharge of pollutants into the waters of the United States. Accordingly, the decision below should be reversed.

Respectfully submitted,

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This form must be completed by all persons applying for a permit for a wastewater facility or activity under Chapter 62-620, F.A.C.

[redacted]

App. 1

DEPARTMENT OF ENVIRONMENTAL PROTECTION

[LOGO]

FLORIDA

WASTEWATER FACILITY OR
ACTIVITY PERMIT
APPLICATION FORM 1
GENERAL INFORMATION

This form must be completed by all persons applying for a permit for a wastewater facility or activity under Chapter 62-620, F.A.C.
See Form 1 to determine which other application forms you will need.

DESCRIPTION OF PERMIT APPLICATION FORMS

Form 1 – General information. This booklet includes general information on applying for a permit for a wastewater facility or activity under Chapter 62-620, Florida Administrative Code (F.A.C.). **Form 1 is required for all permit applications.**

Form 2 – Specific information. This group of forms includes the specific information required for the type of wastewater facility or activity for which a permit is needed. Select the appropriate form(s) to be submitted with Form 1.

Form 2A – Domestic Wastewater Facilities.

Form 2B – Concentrated Animal Feeding Operations and Aquatic Animal Production Facilities.

Form 2CS – Industrial Wastewater Facilities (discharging process wastewater to surface waters).

See form 1 to determine which other application forms you will need.

Form 2CG – Industrial Wastewater Facilities (discharging process wastewater to ground water).

Form 2ES – Industrial Wastewater Facilities (discharging non-process wastewater to surface waters).

Form 2EG – Industrial Facilities (discharging non-process wastewater to ground water).

Form 2F – Stormwater Discharge Associated with Industrial Activity

Form 2CR – Non-Discharging/Closed Loop Recycle System.

## SECTION A – GENERAL INSTRUCTIONS

**Who Must Apply:**

Persons who are or are going to discharge wastewater to waters of Florida or the United States must file for and be granted a permit under Sections 403.087, 403.088, or 403.0885, Florida Statutes (F.S.). Persons that discharge stormwater associated with industrial activity to surface waters of the state must file for and be granted a permit under Section 403.0885, F.S. There are severe penalties for discharging without a permit.

There are some exceptions to this requirement. Discharges of domestic sewage from vessels and discharges from properly operating marine engines are not required to have a permit under the laws listed above. However, discharges of rubbish, trash, garbage or other such materials discharged overboard do require permits. Vessels operated in a capacity other than as a means of transportation are required to have a permit if they are discharging to waters. These types include vessels used as an energy or mining facility, a storage facility, a seafood



processing facility, or an anchored facility for the purpose of mineral or oil exploration or development.

The introduction of sewage, industrial wastes, or other pollutants into a domestic wastewater treatment facility does not need a permit under Sections 403.087, 403.088 or 403.0885, F.S. Persons discharging to permitted wastewater treatment facilities must comply with all applicable pretreatment standards. If a person has a plan or an agreement to switch from direct discharge into waters of the state to discharge to a domestic treatment facility, it does not relieve the person from obtaining a permit for the discharge until such time as the connection is made and the discharge is stopped.

Most discharges from agricultural and silvicultural activities to waters of the state do not require a permit under Sections 403.087, 403.088, or 403.0885, F.S. However, permits under those sections are required for discharges from concentrated animal feeding operations, concentrated aquatic animal production facilities, activities associated with approved aquaculture projects, and silvicultural point sources.

**Where to Apply:**

Permit applications must be filed with the Department of Environmental Protection (DEP) district office shown in Figure 1 for the county in which the wastewater facility or activity is located, except for permit applications for steam electrical generating power plants which are filed with the DEP offices in Tallahassee. DEP officers are located at

[Figure 1. State Map Showing DEP District Offices Omitted In Printing]

**NORTHWEST DISTRICT**
160 Government Center,
Ste 308
Pensacola, Florida 32501-5794
Phone No. (850) 585-8300

**NORTHEAST DISTRICT**
7825 Baymeadows Way,
Suite B-200
Jacksonville, Florida
32256-7577
Phone No. (904) 448-4300

**SOUTHWEST DISTRICT**
3804 Coconut Palm Drive
Tampa, Florida 33619-8318
Phone No. (813) 744-6100

**CENTRAL DISTRICT**
3319 Maguire Boulevard,
Suite 232
Orlando, Florida 32803-3767
Phone No. (407) 894-7555

**SOUTH DISTRICT**
2295 Victoria Avenue,
Suite 364
Fort Myers, Florida 33901
Phone No. (941) 332-6975

**SOUTHEAST DISTRICT**
400 North Congress Avenue
West Palm Beach, Florida
33401
Phone No. (561) 681-6600

**When to Apply:**

Applications must be filed with the appropriate DEP office 180 days before your current permit expires or 180 days before startup of a new or modified facility. If the submitted application is for a new facility or for a modification of an existing facility, the information required for describing the construction must be filed at least 90 days before construction begins. The DEP encourages applicants to file the materials describing the construction of a new facility or the modification of an existing facility as early as possible to avoid problems with delays in startup or facility redesign to achieve effluent limitations.

Federal regulations provide that a new source in the NPDES program may not be constructed or started to be constructed before the issuance of an operation permit. Because of this regulation, a permit application for a new



source may need to be submitted well in advance of the required 180 days.

**Fees:**

Application fees are listed in Section 62-4.050, Florida Administrative Code (F.A.C.). An application will not be processed until the application fee has been paid. If the DEP determines that a permit should be issued for less than five years duration, the application fee will be pro rated.

If permit is issued for a surface water discharge, the permittee will be assessed a regulatory and surveillance program fee annually. Those fees are listed in Section 62-4.052, F.A.C. Failure to pay the annual fee may result in revocation of the permit.

**Availability of Information to the Public:**

Information contained in these applications forms will, upon request, be made available to the public for inspection and copying. However, you may request confidential treatment for certain information which you may submit to supplement the information requested on these forms. Section 62-620.302, F.A.C., and 40 CFR 2 provide set forth the procedures for making the claim. No information on Forms 1 and 2A through 2EG may be claimed as confidential.

**Completion of Forms:**

Unless otherwise specified in instructions to the forms, each item in each form must be answered. To indicate that each item has been considered, enter "NA", for not applicable, if a particular item does not fit the circumstances or characteristics of your facility or activity.

If you have previously submitted information to the DEP which answers a question, you may either repeat the information in the space provided or attach a copy of the previous submission. DO NOT WRITE "ON FILE". Some items in the form require narrative explanation. If more space is necessary to answer a question, attach a separate sheet entitled "Additional Information."

## SECTION B – FORM 1 LINE-BY-LINE INSTRUCTIONS

**This form must be completed by all applicants.**

**Completing This Form:**

Please type or print in the underlined areas only. Some items have a limited number of spaces or characters so that your response may be entered into a computer program. Please do not exceed this maximum number with your response. Abbreviate if necessary to stay within the number of characters allowed for each item. Use one space for breaks between words, but not for punctuation marks unless they are needed to clarify your response.

**Item 1**

Space is provided at the upper right hand corner of Form 1 for insertion of your Facility Identification Number. If you have an existing facility, enter your identification number. If you don't know your identification number, please contact the appropriate DEP office which will provide you with your number. If your facility is new (not yet constructed), leave this item blank.

**Item II**

Answer each question to determine which supplementary forms you need to fill out. Be sure to check the



glossary in Section C of these instructions for the legal definitions of any words you are not certain of their meaning.

If you answer "no" to every question, then you may not need a permit. However, you should call the appropriate district office to determine if you have made a correct determination. If you answer "yes" to any question, then you must complete and file the supplementary form by the deadline listed in Section A along with this form.

**Item III**

Enter the facility's official or legal name. Do not use a colloquial name.

**Item IV**

Give the name, title, and work telephone number of a person who is thoroughly familiar with the operation of the facility, with the facts reported in this application, and who can be contacted by reviewing offices if necessary.

**Item V**

Give the complete mailing address of the office where correspondence should be sent. This often is not the address used to designate the location of the facility or activity.

**Item VI**

Give the address or location of the facility identified in Item III of this form. If the facility lacks a street name or route number, give the most accurate alternative geographic information (for example, section number or quarter section number from county records or at intersection of Rts 426 and 22).

**Item VII**

List four, in descending order of significance, 4-digit standard industrial classification (SIC) codes which best describe your facility in terms of the principal products or services you produce or provide. Also, specify each classification in words. These classifications may differ from the SIC codes describing the operation generating the discharge from the facility.

SIC code numbers are descriptions which may be found in the "Standard Industrial Classification Manual" prepared by the Executive Office of the President, Office of Management and Budget, which is available from the Government Printing Office, Washington, D.C. Your local library may have a copy of this publication which you may use. Use the current edition of the manual. If you have any questions concerning the appropriate SIC code for your facility, please contact the appropriate DEP district office.

**Item VII-A**

Give the name, as it is legally referred to, of the person, firm, public organization, or any other entity which operates the facility described in this application. This may or may not be the same name as the facility. The operator of the facility is the legal entity which controls the facility's operation rather than the plant or site manager. Do not use a colloquial name.

**Item VIII-B**

Indicate whether the entity which operates the facility also owns it by marking the appropriate box.



**Item VIII-C**

Enter the appropriate letter to indicate the legal status of the operator of the facility. Indicate "public" for a facility solely owned by a local government, such as a city, town, county, etc.

**Items VIII-D through H**

Enter the telephone number and address of the operator identified in Item VIII-A.

**Item IX**

Indicate whether the facility is located on Indian Lands.

**Item X**

Give the number of each presently effective wastewater and stormwater permit issued to the facility listed in this application. List relevant federal, state, and local permits. DO NOT LIST ALL YOUR PERMITS. LIST ONLY CURRENT ENVIRONMENTAL PERMITS RELATING TO THIS PROJECT.

**Item XI**

Provide a topographic map or maps of the area extending at least to one mile beyond the property boundaries of the facility which clearly show the following:

The legal boundaries of the facility;

The location and serial number of each of your existing and proposed intake and discharge structures;

All hazardous waste management facilities;

Each well where you inject fluids underground; and

All springs and surface water bodies in the area, plus all drinking water wells within 1/4 mile of the facility which are identified in the public record or otherwise known to you.

If an intake or discharge structure, hazardous waste disposal site, or injection well associated with the facility is located more than one mile from the plan, include it on the map, if possible. If not, attach additional sheets describing the location of the structure, disposal site, or well, and identify the U.S. Geological Survey (or other) map corresponding to the location.

On each map, include the map scale, a meridian arrow showing north, and latitude and longitude at the nearest whole second. On all maps of rivers, show the direction of the current, and in tidal waters, show the directions of the ebb and flow tides. Use a 7-1/2 minute series map published by the U.S. Geological Survey. If a 7-1/2 minute series map has not been published for your facility site, then you may use a 15 minute series map from the U.S. Geological Survey. If neither a 7-1/2 nor 15 minute series map has been published for your facility site, use a plat map or other appropriate map, including all the requested information; in this case, briefly describe land uses in the map area (for example, residential, commercial).

You may trace your map from a geological survey chart, or other map meeting the above specifications. If you do, your map should bear a note showing the number or title of the map or chart from which it was traced. Include the names of nearby towns, water bodies, and other prominent points.



You may obtain a topographic map from:

Eastern Mapping Center
National Cartographic Information Center
U.S. Geological Survey
536 National Center
Reston, VA 22092

**Item XII**

Briefly describe the nature of your business (for example, products produced or services provided).

**Item XIII**

Section 403.161, F.S., provides severe penalties for submitting false information on this application form or any reports or records required by a permit, if issued. There are both civil and criminal penalties, in addition to the revocation of the permit.

Rule 62-620.305, F.A.C., requires that the application and any reports required by the permit, if issued, to be signed as follows:

A. For a corporation, by a responsible corporate officer as described in Rule 62-620.305, F.A.C.;

B. For partnership or sole proprietorship, by a general partner or the proprietor, respectively; or

C. For a municipality, state, federal or other public facility, by a principal executive officer or elected official.

## SECTION C – GLOSSARY

NOTE: This Glossary includes terms used in the instructions and in Forms 1, 2A through 2EG. If you have any questions concerning the meaning of any of these terms, please contact your DEP district office.

**Activity** means any action which results in a discharge of wastes into waters of the State or that is reasonably expected to be a source of water pollution.

**Aliquot** means a sample of specified volume used to make up a total composite sample.

**Animal Feeding Operation** means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

A. Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period; and

B. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

Two or more animal feeding operations under common ownership are a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

**Animal Unit** means a unit of measurement for any animal feeding operation calculated by adding the following number: The number of slaughter and feeder cattle multiplied by 1.0; plus the number of mature dairy cattle multiplied by 1.4; plus the number of swine weighing over 25 kilograms (approximately 55 pounds)



multiplied by 0.4; plus the number of sheep multiplied by 0.1; plus the number of horses multiplied by 2.0.

**Application** means the approved DEP standard forms for applying for a permit, including any approved additions, revisions, or modifications to the forms. Approved forms are numbered, Form 62-620.910, and have an effective date of October 1, 1994, or later.

**Aquifer** means a geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

**Best Management Practices (BMP)** means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs include treatment requirements, operation procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

**Biological Monitoring Test** means any test which include the use of aquatic algal, invertebrate, or vertebrate species to measure acute or chronic toxicity, and any biological or chemical measure of bioaccumulation.

**Bypass** means the intentional diversion of wastes from any portion of a treatment facility.

**Concentrated Animal Feeding Operation** means an animal feeding operation which meets the criteria set forth in Chapter 62-670, F.A.C.

**Concentrated Aquatic Animal Production Facility** means a hatchery, fish farm, or other facility which contains, grows or hold aquatic animals as set forth in Chapter 62-660, F.A.C.

**Contact Cooling Water** means water used to reduce temperature which comes into contact with a raw material, intermediate product, waste product other than heat, or finished product.

**CWA** means the Clean Water Act as amended, 33 U.S.C. 1251 et seq.

**Dike** means any embankment or ridge of either natural or manmade materials used to prevent the movement of liquids, sludges, solids, or other materials.

**Discharge (of a Pollutant)** means any addition of any pollutant or combination of pollutants to waters of the State from any point source; or any addition of any pollutant or combination of pollutants to the marine waters of the State from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes discharges into waters of the State from surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by the State, a municipality, or other person which do not lead to POTWs; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any indirect discharge.

**Effluent Limitation** mean any restriction imposed by the DEP on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into waters of the State.

**Effluent Limitation Guideline** means a regulation published under Section 304(b) of the Clean Water Act to adopt or revise effluent limitations.

**EPA** means the United States Environmental Protection Agency.



**Existing Source or Existing Discharger** means any source which is not a new source or a new discharger.

**Facility** or wastewater facility means any facility which can reasonably be expected to be a source of pollution and includes any or all of the following: a collection and transmission system, a wastewater treatment works, a reuse or disposal system, and a residuals management facility.

**Ground Water** means water below the land surface in a zone of saturation.

**Indirect Discharger** mean an industrial discharger introducing pollutants to a publicly owned treatment works.

**Injection Well** mean a well into which fluids are injected.

**MDG** means millions of gallons per day.

**Municipality** means a city, village, town, borough, county, district, association, or other public body created by or under State law and have jurisdiction over disposal of sewage, industrial wastes, or other wastes.

**National Pollutant Discharge Elimination System (NPDES)** means the national program for issuing, modifying, revoking and reissuing, termination, monitoring and enforcing permits and imposing and enforcing pretreatment requirements, under Sections 307, 318, 402, and 405 of the CWA. The term includes a State program which has been authorized by EPA under 40 CFR Part 123.

**New Discharger** mean any building, structure, facility, or installation: (A) from which there is or may be a new or additional discharge of pollutants at a site at which on October 18, 1972, it had never discharged pollutants; (B) which has never received a finally effective NPDES permit for discharges at that site; and (C) which is not a

"new source." This definition includes an indirect discharger which commences discharging into water of the State. It also includes any existing mobile point source, such as an offshore oil drilling rig, seafood processing vessel, or aggregate plant that begins discharging at a location for which it does not have an existing permit.

**New Source** means any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced: (A) after promulgation of standards of performance under Section 306 of the CWA which are appliable to such source; or (B) after proposal of standards of performance in accordance with Section 306 of CWA which are appliable to such source, but only if the standards are promulgated in accordance with Section 306 within 120 days of their proposal.

**Non-Contact Cooling Water** means water used to reduce temperature which does not come into direct contact with any raw material, intermediate produce, waste product (other than heat), or finished product.

**Off-Site** means any site which is not "on-site."

**On-Site** means on the same or geographically contiguous property which may be divided by public or private right(s)-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right(s)-of-way. Non-contiguous properties owned by the same person, but connected by a right-of-way which the person controls and to which the public does not have access, is also considered on-site property.

**Operator** means the person responsible for the overall operation of a facility.

**Outfall** means a point source.



**Owner** means the person who owns a facility or part of a facility.

**Permit** means an authorization, license, or equivalent control document issued by the State to implement the requirements of 40 CFR 122, 123, and 124 and Chapter 403, F.S.

**Point Source** means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

**Pollutant** means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended), heat, wrecked or discarded equipment, rocks, sand, cellar dirt and industrial, municipal, and agriculture waste discharged into water. It does NOT mean: (A) sewage from vessels; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

**Privately Owned Treatment Works** means any device or system which is used to treat domestic wastewater from any facility which is not a POTW.

**Process Wastewater** means any water which, during manufacturing or processing, comes into direct contact

with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

**Publicly Owned Treatment Works (POTW)** means any device or system used in the treatment (including recycling and reclamation) of domestic sewage or industrial wastes of a liquid nature which is owned by a State or municipality. This definition includes any sewers, pipes, or other conveyances, only if they convey wastewater to a POTW providing treatment.

**Residuals** means the solid, semisolid, or liquid residue generated during the treatment of domestic wastewater. Not included are solids removed from pump stations and lift stations, and screenings and grit removed from the headworks of domestic wastewater treatment facilities. Also not included are other solids removed prior to treatment of the residuals to meet the stabilization standards of Chapter 62-640, F.A.C., or ash generated during the incineration of residuals.

**Sewage From Vessels** means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under Section 312 of the CWA.

**Sewage Sludge** means residuals.

**Silvicultural Point Source** means any discernable, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into water of the State.

**Stormwater Discharge Associated with Industrial Activity** is as defined in 40 CFR 122.26(b)(14).



**Surface Impoundment or Impoundment** means a facility or part of a facility which is a natural topographic depression, manmade excavation, or diked area formed primarily of earthen materials (although it may be lined with manmade materials), which is designed to hold an accumulation of liquid waste or wastes containing free liquids, and which is not an injection well. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

**Toxic Pollutant** means any pollutant listed as toxic under Section 307(a)(1) of the CWA.

**Upset** means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

**Waters of the State** means the waters defined in Section 403.031, F.S., and including waters of the United States to the seaward boundaries of the State.

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[LOGO]

**WASTEWATER FACILITY OR ACTIVITY PERMIT APPLICATION FORM 1 GENERAL INFORMATION**

**I IDENTIFICATION NUMBER:** Facility ID_____

**II CHARACTERISTICS:**

INSTRUCTIONS: Complete the questions below to determine whether you need to submit any permit application forms to the Department of Environmental

Protection. If you answer "yes" to any questions, you must submit this form and the supplemental form listed in the parenthesis following the question. Mark "X" in the blank in the third column if the supplemental form is attached. If you answer "no" to each question, you need not submit any of these forms. You may answer "no" if your activity is excluded from permit requirements. See Section B of the instructions. See also, Section C of the instructions for definitions of the terms used here.

| SPECIFIC QUESTIONS | YES | NO | FORM ATTACHED |
|---|---|---|---|
| A. Is this facility a domestic wastewater facility which results in a discharge to surface or ground waters? | | | |
| B. Does or will this facility (either existing or proposed) include a concentrated animal feeding operation or aquatic animal production facility which results in a discharge to waters? | | | |
| C. Does or will this facility (other than those describe in A. or B.) discharge process wastewater, or non-process wastewater regulated by effluent guidelines or new source performance standards, to surface waters? | | | |
| D. Does or will this facility (other than those described in A. or B.) discharge process wastewater to ground waters? | | | |



| | | | |
|---|---|---|---|
| E. Does or will this facility discharge non-process wastewater, not regulated by effluent guidelines or new source performance standards, to surface waters? | | | |
| F. Does or will this facility discharge non-process wastewater to ground waters? | | | |
| G. Does or will this facility discharge stormwater associated with industrial activity to surface waters? | | | |
| H. Is this facility a non-discharging/closed loop recycle system? | | | |

**III NAME OF FACILITY:** (40 characters and spaces)

| |
|---|
| |

**IV FACILITY CONTACT:** (A. 30 characters and spaces)

| A. Name and Title (Last, first, & title) | B. Phone (area code & no.) |
|---|---|
| | |

**V FACILITY MAILING ADDRESS:** (A. 30 characters and spaces; B. 25 characters and spaces)

| | | |
|---|---|---|
| A. Street or P.O. Box: | | |
| B. City or Town: | State: | Zip Code: |

**VI FACILITY LOCATION:** (A. 30 characters and spaces; B. 24 characters and spaces; C. 3 spaces (if known); D. 25 characters and spaces; E. 2 spaces; F. 9 spaces)

| A. Street, Route or Other Specific Identifier: | | |
|---|---|---|
| B. County Name: | C. County Code (if known): | |
| D. City or Town: | E. State | F. Zip Code: |

**VII SIC CODES:** (4-digit, in order of priority)

| 1. Code # | (Specify) | 2. Code # | (Specify) |
|---|---|---|---|
| 3. Code # | (Specify) | 4. Code # | (Specify) |

**VIII OPERATOR INFORMATION:** (A. 40 characters and spaces; B. 1 character; C. 1 character (if other, specify); D. 12 characters; E. 30 characters and spaces; F. 25 characters and spaces; G. 2 characters, H. 9 characters)

| A. Name: | | B. Is the name in VIII A. the owner? ☐ Yes ☐ No | |
|---|---|---|---|
| C. Status of Operator F = Federal; S = State, P = Private; O = Other M = Public (other than F or S) | (code) | (specify) | D. Phone No.: |
| E. Street or P.O. Box | | | |
| F. City or Town | | G. State: | H. Zip Code: |

**IX INDIAN LAND:** Is the facility located on Indian lands?
☐ Yes ☐ No



**X EXISTING ENVIRONMENTAL PERMITS:**

| A. NPDES Permit No. | B. UIC Permit No. | C. Other (specify) | D. Other (specify) |
|---|---|---|---|
| | | | |

**XI MAP:** Attach to this application a topographic map of the area extending to at least one mile beyond property boundaries. The map must show the outline of the facility, the location of each of its existing and proposed intake and discharge structures, each of its hazardous waste treatment, storage, or disposal facilities, and each well where it injects fluids underground. Include all springs, rivers and other surface water bodies in the map area. See instructions for precise requirements.

**XII NATURE OF BUSINESS** (provide a brief description)

**XIII CERTIFICATION:** (see instructions)

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attachments and that, based on my inquiry of those persons immediately responsible for obtaining the information contained in the application, I believe that the information is true, accurate and complete. I am aware that there are

significant penalties for submitting false information, including the possibility of fine and imprisonment.

| A. Name (type or print) | B. Signature |
|---|---|
| Official Title (type or print) | C. Date Signed |



**[LOGO]**

**APPLICATION**

**FORM 2F**

PERMIT TO DISCHARGE STORMWATER ASSOCIATED WITH INDUSTRIAL ACTIVITY

## INSTRUCTIONS FOR FORM 2F

### Who Must File Form 2F

DEP Form 62-620.910(8) (Form 2F) must be completed by owners or operators of facilities or activities that have stormwater discharge associated with industrial activity to surface waters of the state and for which such discharge is not otherwise covered by a State of Florida generic permit.

In addition to Form 2F,

a. owners or operators that have stormwater discharge associated with industrial activity at a facility which discharges process wastewater to surface water must complete and submit DEP Forms 62-620.910(1) and (5) (Forms 1 and 2CS). (See Rule 62-620.200, F.A.C., for a definition of process wastewater.)

b. owners or operators that have stormwater discharge associated with industrial activity at a facility which discharges process wastewater to ground water must complete and submit DEP Forms 62-620.910(1) and (4) (Forms 1 and 2CG).

c. owners or operators that have stormwater discharge associated with industrial activity at a facility which discharges non-process wastewater to surface water must complete and submit DEP Forms 62-620.910(1) and (7) (Forms 1 and 2ES). (See Rule

62-620.200, F.A.C., for a definition of non-process wastewater.)

d. owners or operators that have stormwater discharge associated with industrial activity at a facility which discharges non-process wastewater to ground water must complete and submit DEP Forms 62-620.910(1) and (6) (Forms 1 and 2EG).

c. owners or operators that have stormwater discharge associated with industrial activity from a domestic wastewater facility must complete and submit DEP Forms 62-620.910(1) and (2) (Forms 1 and 2A). (See Rule 62-620.200, F.A.C., for a defin. ion of domestic wastewater facility.)

**Where to File Applications**

The application forms should be sent to the appropriate Department office listed in Form 1.

**Completeness**

Your application will not be considered complete unless you answer every question on this form and the other forms listed above. If an item does not apply to you, enter "NA" (for not applicable) to show that you considered the question.

**Public Availability of Submitted Information**

You may not claim as confidential any information required by this form or the other required forms, whether the information is reported on the forms or in an attachment. Chapter 119, F.S., requires that all permit applications be made available to the public upon request. Any information, except effluent data, you submit to the Department which goes beyond that required by the forms listed above may be claimed as confidential if the requirements of 40 CFR 2 are met. If you do not



assert a claim of confidentiality at the time of submitting the information, the Department may make the information public without further notice to you.

**Definitions**

"Stormwater discharge associated with industrial activity" is as defined in 40 CFR 122.26(b)(14).

"Material handling activities" means the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, finished product, by-product or waste product. The term excludes areas located on plant lands separate from the industrial activities as long as the drainage from the excluded areas is not missed with stormwater drained from the described areas.

"Significant materials" means raw materials, fuels, solvents, detergents, plastic pellets, finished materials, metallic products, raw materials used in food processing or production, hazardous substances designated under section 101(14) of CERCLA, any chemical the facility is required to report pursuant to section 313 of title III of SARA, fertilizers, pesticides, waste products, ashes, slag and sludge that have the potential to be released with stormwater discharges.

Additional significant terms used in these instructions and in the form are defined in the glossary found in Form 1 or in Chapters 62-600, 62-620, or 62-660, F.A.C.

**ID Number**

Fill in your identification number at the top of each odd-numbered page of Form 2F. You may copy this number directly from Form 1. If you are applying for the initial permit for your facility or activity and do not have an identification number, leave this item blank and the Department will assign a number.

**Item I**

Determine the latitude and longitude of each of your outfalls and the name of the receiving water. If your stormwater is combined with domestic, process or non-process industrial wastewater, indicate which of the outfalls identified on Form 2A, 2CS or 2ES will contain the combined wastewater.

**Items II-A**

If the answer to this question is yes, complete all parts of the chart, or attach a copy of any previous submission you have made to the Department containing the same information.

**Item II-B**

You are not required to submit a description of future pollution control projects if you do not wish to or if none is planned.

**Item III**

Attach a site map showing topography depicting the facility including:

each of its drainage and discharge structures;

the drainage area of each stormwater outfall;

paved areas and buildings within the drainage area of each stormwater outfall, each known past or present areas used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in stormwater runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied;

each of its hazardous waste treatment, storage or disposal facilities (including each area not required to



have a RCRA permit which is used for accumulating hazardous waste for less than 90 days);

each well where fluids from the facility are injected underground; and

springs, and other surface water bodies which receive stormwater discharges from the facility.

**Item IV-A**

For each outfall, provide an estimate of the area drained by the outfall which is covered by impervious surfaces. For the purpose of this application, impervious surfaces are surfaces where stormwater runs off at rates that are significantly higher than background rates (for example, pre-development levels) and include paved areas, building roofs, parking lots, and roadways. Include an estimate of the total area, including all impervious and pervious areas, drained by each outfall. The site map required under Item III can be used to estimate the total area drained by each outfall.

**Item IV-B**

Provide a narrative description of significant materials that are currently or in the past three years have been treated, stored, or disposed in a manner to allow exposure to stormwater; method of treatment, storage or disposal of these materials; past and present materials management practices employed, in the last three years, to minimize contact by these materials with stormwater runoff; materials loading and access areas and the location, manner, and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied. Significant materials should be identified by chemical name, form (powder, liquid, etc.), and type of container or treatment unit. Indicate any materials treated, stored, or disposed of together.

**Item IV-C**

For each outfall, structural controls include structures which enclose material handling or storage areas covering materials, berms, dikes, or diversion ditches around manufacturing, production, storage or treatment units, retention ponds, etc. Non-structural controls include practices such as spill prevention plans, employee training, visual inspections, preventive maintenance, and housekeeping measure that are used to prevent or minimize the potential for releases of pollutants.

**Item V**

Provide a certification that all outfalls that should contain stormwater discharge associated with industrial activity have been tested or evaluated for the presence of non-stormwater discharges which are not covered by an wastewater permit under Rule 62-620, F.A.C. Tests for such non-stormwater discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. Part B must include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test. All non-stormwater discharges must be identified in the appropriate form from the "Form 2" series which must accompany this application.

**Item VI**

Provide a description of existing information regarding the history of significant leaks or spills of toxic or hazardous pollutants at the facility in the last three years.

**Item VII-A, B, and C**

These items require you to collect and report data on the pollutants discharged for each of your outfalls. Each part of this item addresses a different set of pollutants and must be completed in accordance with the specific



instructions for that part. The following general instructions apply to the entire item.

**General Instructions for Item VII-A, B, and C**

Part A requires you to report at least one analysis for each pollutant listed. Parts B and C requires you to report analytical data in two ways. For some pollutants addressed in Parts B and C, if you know or have reason to know that the pollutant is present in your discharge, you may be required to list the pollutant and test (sample and analyze) and report the levels of the pollutants in your discharge. For all other pollutants addressed in Parts B and C, you must list the pollutant if you know or have reason to know that the pollutant is present in the discharge, and either report quantitative data for the pollutant or briefly describe the reasons the pollutant is expected to be discharged. (See specific instructions on the form and below for Parts A through C.) Base your determination that a pollutant is present in or absent from your discharge on your knowledge of your raw materials, material management practices, maintenance chemicals, history of spills and releases, intermediate and final products and by-products, and any previous analyses known to you of your effluent or similar effluent.

**A. Sampling:** The collection of the samples for the reported analyses shall be in accordance with 40 CFR 136 and Rule 62-160, F.A.C. Any specific requirements contained in the applicable analytical methods should be followed for sample containers, sample preservation, holding times, the collection of duplicate samples, etc. The time when you sample should be representative, to the extent feasible, of your treatment system operating properly with no system upsets. Samples should be collected from the center of the flow channel, where turbulence is at a maximum, at a site specified in your

present permit, or at any site adequate for the collection of a representative sample.

For pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform, grab samples taken during the first 30 minutes, or as soon thereafter as practicable, of the discharge must be used. For all other pollutants both a grab sample collected during the first 30 minutes, or as soon thereafter as practicable, of the discharge and a flow-weighted composite sample must be analyzed. However, a minimum of one grab sample may be taken for effluents from holding ponds or other impoundments with a retention period of greater than 24 hours.

All samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches and at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. Where feasible, the variance in the duration of the event and the total rainfall of the event should not exceed 50 percent from the average or median rainfall event in that area.

A grab sample shall be taken during the first 30 minutes, or as soon thereafter as practicable, and a flow-weighted composite shall be taken for the entire event or for the first three hours of the event.

Grab and composite samples are defined as follows:

**Grab sample:** An individual sample of at least 100 milliliters collected during the first 30 minutes, or as soon thereafter as practicable, of the discharge. This sample is to be analyzed separately from the composite sample.

**Flow-Weighted Composite sample:** A flow-weighted composite sample may be taken with a continuous sampler that proportions the amount of sample collected with the flow rate or as a combination of



a minimum of three sample aliquots taken in each hour of discharge for the entire event or for the first three hours of the event, with each aliquot being at least 100 milliliters and collected with a minimum period of 15 minutes between aliquot collections. The composite must be flow proportional; either the time interval between each aliquot or the volume of each aliquot must be proportional to either the stream flow at the time of sampling or the total stream flow since the collection of the previous aliquot. Aliquots may be collected manually or automatically. Where GC/MX Volatile Organic Analysis (VOA) is required, aliquots must be combined in the laboratory immediately before analysis. Only one analysis for the composite sample is required.

Data from samples taken in the past may be used, provided that all data requirements are met; sampling was done no more than three years before submission; and all data are representative of the present discharge.

Among the factors which would cause the data to be unrepresentative are significant changes in production level, changes in raw materials, processes, or final products, and changes in stormwater treatment. The Department may request additional information, including current quantitative data, if it is necessary to assess your discharges. The Department may allow or establish appropriate site-specific sampling procedures or requirements, including sampling locations, the season in which the sampling takes place, the minimum duration between the previous measurable storm event and the storm event sampled, the minimum or maximum level of precipitation required for an appropriate storm event, the protocols for collecting samples under 40 CFR 136 or Rule 62-160, F.A.C., and additional time for submitting data on a case-by-case basis.

**B. Reporting:** All levels must be reported as concentration and mass. Grab samples are reported in terms of concentration. You may report some or all of the required data by attaching separate sheets of paper instead of filling out pages VII-1 and VII-2 if separate sheets contain all the required information in a format which is consistent with pages VII-1 and VII-2 in spacing and identification of pollutants and columns. Use the abbreviations listed below in the columns headed "Units."

| Concentration | | Mass | |
|---|---|---|---|
| ppb | parts per billion | lbs | pounds |
| ppm | parts per million | ton | tons (English tons) |
| mb/L | milligrams per liter | mg | milligrams |
| ug/L | micrograms per liter | g | grams |
| | | kg | kilograms |
| | | T | tonnes (metric tons) |

All reporting of values for metals must be in terms of "total recoverable metal." unless

(1) An applicable, promulgated effluent limitation or standard specifies the limitation for the metal in dissolved, valent, or total form; or

(2) All approved analytical methods for the metal inherently measure only its dissolved form; or

(3) The Department has determined that in establishing case-by-case limitations it is necessary to express the limitations on the metal in dissolved, valent, or total form to carry out the provision of the CWA. If you measure only one grab sample and one flow-weighted composite sample for a given outfall, complete only the "Maximum Values" columns and insert "1" into "Number of Storm Events Sampled" column. The department may require you to conduct



additional analyses to further characterize your discharges.

If you measure more than one value for a grab sample or a flow-weighted composite sample for a given outfall and those values are representative of your discharge, you must report them. You must describe your method of testing and data analysis. You also must determine the average of all values within the last year and report the concentration and mass under the "Average Values" columns, and the total number of storm events samples under the "Number of Storm Events Sampled" columns.

**C. Analysis:** You must use test methods promulgated in 40 CFR 136 or Rule 62-160, F.A.C.; however, if none has been promulgated for a particular pollutant, you may use any suitable method for measuring the level of pollutant in your discharge provided that you submit a description of the method or a reference to a published method. Your description should include the sample holding time, preservation techniques, and the quality control measures which you used. If you have two or more substantially identical outfalls, you may request permission to sample and analyze only one outfall and submit the results of the analysis for other substantially identical outfalls. If your request is granted by the Department, on a separate sheet attached to the application form, identify which outfall you did test and describe why the outfalls which you did not test are substantially identical to the outfall which you did test.

**Part VII-A**

Part VII-A must be completed by all applicants for all outfalls who must complete Form 2F.

Analyze a grab sample collected during the first 30 minutes, or as soon thereafter as practicable, of the discharge and flow-weighted composite samples for all pollutants in this Part, and report the results except use

only grab samples for pH and oil and grease. See discussion in General instructions to Item VII for definitions of grab sample collected during the first 30 minutes of discharge and flow-weighted composite sample. The "Average Values" column is not compulsory but should be filled out if data are available.

**Part VII-B**

List all pollutants that are limited in an effluent guideline which the facility is subject to or any pollutant listed in the wastewater permit for the facility if the facility is operating under an existing wastewater permit. Complete one table for each outfall. The "Average Values" column is not compulsory but should be filled out if data are available. Analyze a grab sample for all pollutants in this Part, and report the results, except as provided in the General Instructions.

**Part VII-C**

Part VII-C must be completed by all applicants for all outfalls which discharge stormwater associated with industrial activity. Use both a grab sample and a composite sample for all pollutants you analyze for in this part except use grab samples for residual chlorine and fecal coliform. The "Average Values" column is not compulsory but should be filled out if data are available. Part C requires you to address the pollutants in Table 2F-2, 2F-3, and 2F-4 for each outfall. Pollutants in each of these Tables are addressed differently.

**Table 2F-2:** For each outfall, list all pollutants in Table 2F-2 that you know or have reason to believe are discharged, except pollutants previously listed in Part VII-B. If a pollutant is limited in an effluent guideline limitation for the facility, the pollutant must be analyzed and reported in Part VII-B. If a pollutant in Table 2F-2 is indirectly limited by an effluent guideline limitation through an indicator (e.g., TSS used as an indicator to



control the discharge of iron and aluminum), you must analyze for it and report the data in Part VII-B. For other pollutants listed in Table 2F-2, those not limited directly or indirectly by an effluent limitation guideline, that you know or have reason to believe are discharged, you must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

**Table 2F-3:** For each outfall, list all pollutants in Table 2F-3 that you know or have reason to believe are discharged. For every pollutant in Table 2F-3 expected to be discharged in concentrations of 10 ppb or greater, you must submit quantitative data. For acrolein; acrylonitrile; 2,4 dinitrophenol; and 2-methyl-4, 6 dinitrophenol, you must submit quantitative data if any of these four pollutants is expected to be discharged in concentrations 100 ppb or greater. For every pollutant expected to be discharged in concentrations less than 10 ppb (or 100 ppb for the four pollutants listed above), then you must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

**Table 2F-4:** For each outfall, list any pollutant in Table 2F-4 that you know or believe to be present in the discharge and explain why you believe it to be present. No analysis is required, but if you have analytical data, you must report them. Certain discharges of hazardous substances may be exempted from the requirements of section 311 of the CWA which establishes reporting requirements. Please contact the Department for further information.

**Part VII-D**

If sampling is conducted during more than one storm event, you only need to report the information requested in Part VII-D for the storm event(s) which resulted in

any maximum pollutant concentration report in Part VII-A, VII-B, or VII-C.

Provide flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, the method of flow measurement, or estimation. Provide the data and duration of the storm event(s) sampled, rainfall measurement, or estimates of the storm event which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event.

**Part VII-E**

List any toxic pollutant listed in Tables 2F-2, 2F-3, or 2F-4 which you currently use or manufacture as an intermediate or final product or by-product. In addition, if you know or have reason to believe that 2,3,7,8 tetrachlorodibenzo-p-dioxin (TCDD) is discharged, or if you use or manufacture 2,4,5-trichlorophenoxy acetic acid (2,4,5,-T); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 3,4,5-TP); 2-(2,4,5-trichlorophenoxy) ethyl, 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorphenyl) phosphorothicate (Ronnel); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); then list TCDD. The Department may waive or modify the requirement if you demonstrate that it would be unduly burdensome to identify each toxic pollutant and the Department has adequate information to issue your permit. You may not claim this information as confidential; however, you do not have to distinguish between use or production of the pollutants or list the amounts.

**Item VIII**

Self explanatory. The Department may ask you to provide additional details after your application is received.



**Item X**

Chapter 403, F.S., provides for severe penalties for submitting false information on this application form. Rule 62-620.305, F.A.C., requires the certification in this item to be signed by an appropriate and responsible authority. If the certification is not signed in accordance with this rule, the application will be deemed incomplete and returned.

**TABLE 2F-1**
**CODES FOR TREATMENT UNITS**

**Physical Treatment Processes**

| | |
|---|---|
| 1-A Ammonia Stripping | 1-N Microstraining |
| 1-B Dialysis | 1-O Mixing |
| 1-C Diatomaceous Earth Filtration | 1-P Moving Bed Filters |
| 1-D Distillation | 1-Q Multimedia Filtration |
| 1-E Electrodialysis | 1-R Percolation Pond |
| 1-F Evaporation | 1-S Rapid Sand Filtration |
| 1-G Flocculation | 1-T Reverse Osmosis (Hyperfiltration) |
| 1-H Flotation | 1-U Screening |
| 1-I Foam Fractionation | 1-V Sedimentation (Settling) |
| 1-J Freezing | 1-W Slow Sand Filtration |
| 1-K Gas-Phase Separation | 1-X Solvent Extraction |
| 1-L Grinding (Comminutors) | 1-Y Sorption |
| 1-M Grit Removal | |

**Chemical Treatment Processes**

| | |
|---|---|
| 2-A Carbon Adsorption | 2-G Disinfection (Ozone) |
| 2-B Chemical Oxidation | 2-H Disinfection (Other) |
| 2-C Chemical Precipitation | 2-I Electrochemical Treatment |
| 2-D Coagulation | 2-J Ion Exchange |
| 2-E Dechlorination | 2-K Neutralization |
| 2-F Disinfection (Chlorine) | 2-L Reduction |

**Biological Treatment Processes**

3-A Activated Sludge
3-B Aerated Lagoons
3-C Anaerobic Treatment
3-D Nitrification-Denitrification
3-E Pre-Aeration
3-F Spray Irrigation/Land Application
3-G Stabilization Ponds
3-H Trickling Filtration

**Other Processes**

4-A Discharge to Surface Water
4-B Ocean Discharge Through Outfall
4-C Reuse/Recycle of Treated Effluent
4-D Underground Injection

**Sludge Treatment and Disposal Processes**

5-A Aerobic Digestion
5-B Anaerobic Digestion
5-C Belt Filtration
5-D Centrifugation
5-E Chemical Conditioning
5-F Chlorine Treatment
5-G Composting
5-H Drying Beds
5-I Elutriation
5-J Flotation Thickening
5-K Freezing
5-L Gravity Thickening
5-M Heat Drying
5-N Heat Treatment
5-O Incineration
5-P Land Application
5-Q Landfill
5-R Pressure Filtration
5-S Pyrolysis
5-T Sludge Lagoons
5-U Vacuum Filtration
5-V Vibration
5-W Wet Oxidation

**TABLE 2F-2**
**CONVENTIONAL AND NON-CONVENTIONAL POLLUTANTS REQUIRED TO BE TESTED BY EXISTING DISCHARGER IF EXPECTED TO BE PRESENT**

Aluminum, Total
Barium, Total
Boron, Total
Bromide
Manganese, Total
Nitrate-Nitrite
Nitrogen, Total Organic
Oil and Grease



Chlorine, Total Residual
Cobalt, Total
Color
Fecal Coliform
Fluoride
Iron, Total
Magnesium, Total
Molybdenum, Total
Phosphorus, Total
Radioactivity
Sulfate
Sulfide
Sulfite
Surfactants
Tin, Total
Titanium, Total

**TABLE 2F-3**
**TOXIC POLLUTANTS REQUIRED TO BE IDENTIFIED BY APPLICANT IF EXPECTED TO BE PRESENT**

**Toxic Pollutants and Total Phenol**

Antimony, Total
Arsenic, Total
Beryllium, Total
Cadmium, Total
Chromium, Total
Copper, Total
Cyanide, Total
Lead, Total
Mercury, Total
Nickel, Total
Phenols, Total
Selenium, Total
Silver, Total
Thallium, Total
Zinc, Total

**GC/MS Fraction Volatiles Compounds**

Acrolein
Acrylonitrile
Benzene
Bromoform
Carbon Tetrachloride
Chlorobenzene
Chlorodibromoethane
Chloroethane
2-Chloroethylvinyl Ether
Chloroform
Dichlorobromomethane
1,1-Dichloroethane
1,2-Dichloroethane
1,1-Dichloroethylene
1,2-Dichloropropane
1,3-Dichloropropylene
Ethylbenzene
Methyl Bromide
Methyl Chloride
Methylene Chloride
1,1,2,2-Tetrachloroethane
Tetrachloroethylene
Toluene
1,2-Trans, Dichloroethylene
1,1,1-Trichloroethane
1,1,2-Trichloroethane
Trichloroethylene
Vinyl Chloride

### Acid Compounds

| | | |
|---|---|---|
| 2-Chlorophenol | 2,4-Dinitrophenol | Pentachlorophenol |
| 2,4-Dichlorophenol | 2-Nitrophenol | Phenol |
| 2,4-Dimethyl-phenol | 4-Nitrophenol | 2,4,6-Trichloro-phenol |
| 4,6-Dinitro-O-Cresol | p-Chloro-M-Cresol | |

### Base/Neutral

| | | |
|---|---|---|
| Acenaphthene | 2-Chloronaphtha-lene | Fluroanthene |
| Acenaphthylene | | Fluorene |
| Anthracene | 4-Chlorophenyl Phenyl Ether | Hexachlorobenzene |
| Benzidine | | Hexachlorobutadiene |
| Benzo(a)anthracene | Chrysene | Hexachloroethane |
| Benzo(a)pyrene | Dibenzo(a,h)an-thracene | Indeno(1,2,3-ed) pyrene |
| 3,4-Benzofluroran-thene | 1,2-Dichloroben-zene | Isophorone |
| Benzo(ghi)perylene | | Napthalene |
| Benzo(k)fluoran-thene | 1,3-Dichloroben-zene | Nitrobenzene |
| | | N-Nitrosodimethyl-amine |
| Bis(2-chloroe-thoxy)methane | 1,4-Dichloroben-zene | |
| | | N-Nitrosodi-N-Propylamine |
| Bis(2-chloroe-thyl)ether | 3,3-Dichlorobenzi-dine | |
| | | N-Nitrosodiphenyl-amine |
| Bis(2-chloro-isopropyl)ether | Diethyl Phthalate | Phenanthrene |
| | Dimethyl Phtha-late | Pyrene |
| Bis(2-ethyly-hexyl)phthalate | | 1,2,4-Trichloroben-zene |
| | Di-N-Butyl Phtha-late | |
| 4-Bromophenyl Phenyl Ether | 2,4-Dinitrotoluene | |
| | 2,6-Dinitrotoluene | |
| Butylbenzyl Phthalate | Di-N-Octylphtha-late | |
| | 1,2-Diphenylhydra-zine (as Azobenzene) | |



### Pesticides

| | | |
|---|---|---|
| Aldrin | Dieldrin | PCB-1242 |
| Alpha-BHC | Alpha-Endosulfan | PCB-1254 |
| Beta-BHC | Beta-Endosulfan | PCB-1221 |
| Gamma-BHC | Endosulfan Sulfate | PCB-1232 |
| Delta-BHC | Endrin | PCB-1248 |
| Chlordane | Endrin Aldehyde | PCB-1260 |
| 4,4'-DDT | Heptachlor | PCB-1016 |
| 4,4'-DDE | Heptachlor Epoxide | Toxaphene |
| 4,4'-DDD | | |

## TABLE 2F-4
## HAZARDOUS SUBSTANCES REQUIRED TO BE IDENTIFIED BY APPLICANT IF EXPECTED TO BE PRESENT

### Toxic Pollutant

Asbestos

### Hazardous Substances

| | | |
|---|---|---|
| Acetaldehyde | Dinitrobenzene | Parathion |
| Allyl alcohol | Diquat | Phenolsulfonate |
| Allyl chloride | Disulfoton | Phosgene |
| Amyl acetate | Diuron | Progargite |
| Aniline | Epichlorohydrin | Propylene oxide |
| Benzonitrile | Ethion | Pyrethrins |
| Benzyl chloride | Ethylene diamine | Quinoline |
| Butyl acetate | Ethylene dibromide | Resorcinol |
| Butylamine | Formaldehyde | Stronthium |
| Carbaryl | Furfural | Strychnine |
| Carbofuran | Guthion | Styrene |
| Carbon disulfide | Isoprene | 2,4,5-T (2,4,5-Trichloro-phenoxyacetic acid) |
| Chlorpyrifos | Isopropanolamine | |
| Coumaphos | Kelthane | |
| Cresol | Kepone | |
| Crotonaldehyde | Malathion | |

Cyclohexane
2,4-D (2,4-dichlorophenoxyacetic acid)
Diazinon
Dicamba
Dichlobenil
Dichlone
2,2-Dichloropropionic acid
Dichorvos
Diethyl amine
Dimethyl amine
Mercaptodimethur
Methoxychlor
Methylmercaptan
Methyl methacrylate
Methyl parathion
Mevinphos
Mexacarbate
Monoethyl amine
Monomethyl amine
Naled
Napthenic acid
Nitrotoluene
TDE (Tetrachlorodiphenyl ethane)
2,4,5-TP (2-(2,4,5-Trichlorophenoxy) propanoic acid)
Trichlorofan
Triethylamine
Trimethylamine
Uranium
Vanadium
Vinyl acetate
Xylene
Xylenol
Zirconium

**FORM 2F** [LOGO]

## APPLICATION FOR PERMIT FOR STORMWATER DISCHARGE ASSOCIATED WITH INDUSTRIAL ACTIVITY

Facility I.D. Number _____

Please type or print in black ink. If additional space is needed for your answer, use plain sheets and attach to the application form.

### I. Outfall Location:

For each outfall, list the latitude and longitude of its location to the nearest 15 seconds and the name of the receiving water.



| A. Outfall Number (list) | B. Latitude | | | C. Longitude | | | D. Receiving Water (Name) |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| | | | | | | | |
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### II. Improvements:

A. Are you now required by any Federal, State, or local authority to meet any implementation schedule for the construction, upgrading or operation of stormwater or wastewater treatment equipment or practices or any other environmental programs which may affect the discharges described in this application? This includes, but is not limited to, permit conditions, administrative or enforcement orders, enforcement compliance schedule letters, stipulations, court orders, and grant or loan conditions?

| 1. Identification of Conditions, Agreements | 2. Affected Outfalls | |
|---|---|---|
| | No. | Source of Discharge |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |

| 3. Brief Description of Project | 4. Final Compliance Date | |
|---|---|---|
| | a. required | b. projected |
| | | |
| | | |
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| | | |

B. You may attach additional sheets describing any additional water pollution or other environmental projects which may affect your discharge that you now have underway or which you plan. Indicate whether each program is now underway or planned, and indicate your actual or planned schedules for construction.

## III. Site Drainage Map:

Attach a site map showing topography depicting the facility including each of its intake and discharge structures; the drainage area of each stormwater outfall; paved areas and buildings within the drainage area of each stormwater outfall; each known past or present areas used for outdoor storage or disposal of significant materials; each existing structural control measure to reduce pollutants in stormwater runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied; each of its hazardous waste treatment, storage or disposal units; each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive stormwater discharges from the facility. Show hazardous waste storage or disposal areas that do not require a RCRA permit separate from those which do require a permit.



## IV. Narrative Description of Pollutant Sources:

A. For each outfall, provide an estimate of the area (include units) of impervious surfaces, including areas and building roofs, drained to the outfall, and an estimate of the total surface area drained by the outfall.

| Outfall No. | Area of Impervious Surface (units) | Total Area Drained (units) |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

| Outfall No. | Area of Impervious Surface (units) | Total Area Drained (units) |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

B. Provide a narrative description of significant materials that are currently, or in the past three years have been, treated, stored or disposed in a manner that allows exposure to stormwater, method of treatment, storage, or disposal; past and present materials management practices employed to minimize contact with stormwater runoff; materials loading and access areas; and the location, manner, and frequency in which pesticides, herbicides, soil conditioners, and fertilizers are applied.

C. For each outfall, provide the location and a description of existing structural and nonstructural control measures to reduce pollutants in stormwater runoff; and a description of the treatment the

stormwater receives, including the schedule and type of maintenance for control and treatment measures and the ultimate disposal of any solid or fluid wastes other than by discharge.

| Outfall No. | Treatment | Table 2F-1 Code |
|---|---|---|
| | | |

**V. Non-stormwater Discharges:**

A. I certify under penalty of law that the outfall(s) covered by this application have been tested or evaluated for the presence of non-stormwater discharges, and that all non-stormwater discharges from these outfall(s) are identified in either an accompanying DEP Form 62-620.910(5) or (7) (Forms 2CS or 2ES) application for the outfall.

| Name and Official Title (type or print) | Signature | Date Signed |
|---|---|---|
| | | |

B. Provide a description of the method used, the date of any testing, and the onsite drainage points that were directly observed during a test.



**VI. Significant Leaks or Spills:**

Provide existing information regarding the history of significant leaks or spills of toxic or hazardous pollutants at the facility in the last three years, including the approximate date and location of the spill or leak, and the type and amount of material released.

**VII. Discharge Information:**

A, B, C, & D: See instructions before proceeding. Complete one set of tables for each outfall. Annotate the outfall number in the space provided. Tables VII-A, VII-B, and VII-C are included on separate sheets numbered VII-1 and VII-2.

E. Potential discharge not covered by analysis – is any toxic pollutant listed in Table 2F-2, 2F-3, or 2F-4, a substance or a component of a substance which you currently use or manufacture as an intermediate or final product or by-product?

☐ Yes (list all such pollutants below) ☐ No (go to section VIII)

**VIII. Biological Toxicity Testing Data**

Do you have any knowledge or reason to believe that any biological test for acute or chronic toxicity has been made on any of your discharges or on a receiving water in relation to your discharge within the last 3 years?

☐ Yes (list results below) ☐ No (go to section IX)

## IX. Contract Analysis Information

Were any of the analysis reported in item VII performed by a contract laboratory or consulting firm?

☐ Yes (list the name, address, and telephone number of, and pollutants analyzed by each such laboratory or firm below)

☐ No (go to section X)

| A. Name | B. Address | C. Area Code & Phone No. | D. Pollutants Analyzed |
|---|---|---|---|
| | | | |
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## X-A. Certifications for New or Modified Facilities

[See X-B Follows]

I certify that the engineering features of this pollution control project have been designed by me and found to be in conformity with sound engineering principles, applicable to the treatment and disposal of pollutants characterized in the permit application. There is reasonable assurance, in my professional judgment, that the pollution control facilities, when properly maintained and operated, will discharge an effluent that complies with all applicable statutes of the State of Florida and the rules of the Department. It is also agreed that the undersigned, if authorized by the owner, will furnish the applicant a set of instructions for the proper maintenance and operation of the pollution control facilities and, if applicable, pollution sources.



Signature

Name (please type):

(Affix Seal)

Company Name:

Address: _____

Florida Registration No.: _____

Telephone No.: _____

Date: _____

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those person directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Name & Official Title (type or print)

Signature

Telephone No. (area code & no.)

Date Signed

## X-B. CERTIFICATIONS FOR PERMIT RENEWALS

I certify that the engineering features of this pollution control project have been examined by me and found to be in conformity with sound engineering principles, applicable to the treatment and disposal of pollutants

characterized in the permit application. There is reasonable assurance, in my professional judgment, that the pollution control facilities, when properly maintained and operated, will discharge an effluent that complies with all applicable statutes of the State of Florida and the rules of the Department.

| | |
|---|---|
| _____ | _____ |
| Signature | Company Name: |
| _____ | Address: _____ |
| Name (please type): | _____ |
| | _____ |
| | Florida Registration No.: _____ |
| (Affix Seal) | Telephone No.: _____ |
| | Date: _____ |

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those person directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

| | |
|---|---|
| _____ | _____ |
| Name & Official Title (type or print) | Signature |
| _____ | _____ |
| Telephone No. (area code & no.) | Date Signed |

Facility I.D. Number: _____

**VII. Discharge Information (Continued from page 2F-15 of Form 2F)**

**Part A** - You must provide the results of at least one analysis for every pollutant in this table. Complete one table for each outfall. See instructions for additional details.

| Pollutant and CAS Number (if available) | Minimum Values (include units) | | Average Values (include units) | | # of Storm Events Sampled | Sources of Pollutants |
|---|---|---|---|---|---|---|
| | Grab Sample Taken During First 30 Minutes | Flow-weighted Composite | Grab Sample Taken During First 30 Minutes | Flow-weighted Composite | | |
| Oil and Grease | | N/A | | | | |
| Biochemical Oxygen Demand ($BOD_5$) | | | | | | |
| Chemical Oxygen Demand (COD) | | | | | | |
| Total Suspended Solids (TSS) | | | | | | |
| Total Kjeldahl Nitrogen | | | | | | |
| Nitrate + Nitrite Nitrogen | | | | | | |
| Total Phosphorus | | | | | | |
| pH | Minimum | Maximum | Minimum | Maximum | | |

**Part B** - List each pollutant that is limited in an effluent guideline which the facility is subject to or any pollutant listed in the facility's wastewater permit for its wastewater effluent if the facility is operating under an existing wastewater permit. Complete one table for each outfall. See instructions for additional details and requirements.

| Pollutant and CAS Number (if available) | Minimum Values (include units) | | Average Values (include units) | | # of Storm Events Sampled | Sources of Pollutants |
|---|---|---|---|---|---|---|
| | Grab Sample Taken During First 30 Minutes | Flow-weighted composite | Grab Sample Taken During First 30 Minutes | Flow-weighted Composite | | |
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**VII. Discharge Information (Continued from Table VII on page VII - 1 of Form 2F)**

**Part C - List each pollutant shown in Tables 2F-2, 2F-3, and 2F-4 that you know or have reasons to believe is present. Complete one table for each outfall. See instructions for additional details.**

| Pollutant and CAS Number (if available) | Minimum Values (include units) | | Average Values (include units) | | # of Storm Events Sampled | Sources of Pollutants |
|---|---|---|---|---|---|---|
| | Grab Sample Taken During First 30 Minutes | Flow-weighted Composite | Grab Sample Taken During First 30 Minutes | Flow-weighted Composite | | |
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**Part D - Provide data for the storm event(s) which resulted in the maximum values for the flow weighted composite sample.**

| 1. Date of Storm Event | 2. Duration of Storm Event (in minutes) | 3. Total rainfall during storm event (in inches) | 4. Number of hours between beginning of storm measured and end of previous measurable rain event | 5. Maximum flow rate during rain event (specify units) | 6. Total flow from rain event (specify units) | 7. Comments |
|---|---|---|---|---|---|---|
| | | | | | | |

Provide a description of the method of flow measurement or estimate.

App. 54

FILED
SEP 10 2003
OFFICE OF THE CLERK

No. 02-626

IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR *AMICI CURIAE* FLORIDA FRUIT AND VEGETABLE ASSOCATION, FLORIDA FARM BUREAU FEDERATION, AMERICAN FAM BUREAU FEDERATION, and CHARLES H. BRONSON, as the FLORIDA COMMISSIONER OF AGRICULTURE IN SUPPORT OF PETITIONER

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30 pp

## QUESTIONS PRESENTED

1. Whether the National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342, component of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, authorizes state programs to address nonpoint sources of pollution not covered by the NPDES program.

2. Whether the Eleventh Circuit's decision would have the effect of overriding the agricultural exemptions of the Clean Water Act and the NPDES program.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| STATEMENT | 1 |
| INTEREST OF *AMICI CURIAE* | 2 |
| ARGUMENT | 5 |
| I. THE CLEAN WATER ACT AUTHORIZES STATE PROGRAMS TO ADDRESS NON-POINT SOURCES OF POLLUTION NOT COVERED BY THE NPDES PROGRAM | 5 |
| A. Framework of the CWA | 5 |
| B. Conservation—National View | 8 |
| C. Florida Programs Addressing Nonpoint Sources of Pollution | 9 |
| 1. Florida's TMDL Program | 10 |
| 2. Florida's Office of Agricultural Water Policy | 11 |
| 3. Suwannee River Partnership | 12 |
| 4. Florida's Lake Okeechobee Protection Program | 14 |
| 5. Florida's Everglades Forever Act | 15 |
| 6. Summary | 16 |
| II. THE ELEVENTH CIRCUIT'S DECISION WOULD HAVE THE EFFECT OF OVER-RIDING THE AGRICULTURAL EXEMPTIONS OF THE CLEAN WATER ACT AND THE NPDES PROGRAM | 16 |

TABLE OF CONTENTS—Continued


| | Page |
|---|---|
| A. Agricultural Exemptions | 16 |
| B. Legislative History of the Agricultural Exemptions | 18 |
| C. Effect of Eleventh Circuit's Decision on the Agricultural Exemptions | 20 |
| CONCLUSION | 22 |




TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002) | 20 |
| *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir. 1996) | 16 |
| *Lane et al. v. Florida Department of Environmental Protection*, Case Nos. 1D02-2043 and 1D02-2319 (Fla. 1st DCA, May 20, 2003) | 10 |
| *Natural Resources Defense Council v. EPA*, 915 F.2d 1314 (9th Cir. 1990) | 6 |
| *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *affirmed sub nom. Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) | 19 |
| *Oregon Natural Resources Council v. Untied States Forest Service*, 834 F.2d 842 (9th Cir. 1987) | 6 |
| *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) | 6 |
| **CONSTITUTION AND STATUTES** | |
| *Clean Water Act*, 33 U.S.C. §§ 1251-1387 | |
| 33 U.S.C. § 1288 | 5, 6, 7 |
| 33 U.S.C. § 1311 | 6 |
| 33 U.S.C. § 1311(a) | 16 |
| 33 U.S.C. § 1329 | 6, 7 |
| 33 U.S.C. § 1329(b) | 7, 9 |
| 33 U.S.C. § 1329(h) | 9 |
| 33 U.S.C. § 1342 | 4, 6 |
| 33 U.S.C. § 1342(l) | 4, 17 |
| 33 U.S.C. § 1342(a) | 6, 17 |
| 33 U.S.C. § 1342(b) | 6 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 33 U.S.C. § 1342(c) | 17 |
| 33 U.S.C. § 1342(d) | 9, 10 |
| 33 U.S.C. § 1342(p) | 19 |
| 33 U.S.C. § 1362(14) | 4, 6, 17, 20 |
| Pub. L. 92-500, § 208 (1972); 86 Stat. 816, 839-841, *codified as amended*, 33 U.S.C. § 1288 | 5, 18 |
| Pub. L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (1972), *codified as amended*, 33 U.S.C. § 1288(b)(2)(F) | 18 |
| Pub. L. 92-500, § 402; 86 Stat. 816, 880-883 (1972), *modified as amended* 33 U.S.C. § 1342 | 18 |
| Pub. L. 95-217, § 33(b); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1362(14) | 19 |
| Pub. L. 95-217, § 33(c); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1342(l) | 19 |
| Pub. L. 100-4, § 503; 101 Stat. 7, 75 (1987), *codified as amended*, 33 U.S.C. § 1462(14) | 19 |
| *Farm Security and Rural Investment Act of 2002*, Pub. L. 107-171, 116 Stat. 134-540 | 8 |
| § 2001, 116 Stat. 225-230, *codified as amended*, 16 U.S.C. § 3838a | 8 |
| § 2301, 116 Stat. 253-258, *codified as amended*, 16 U.S.C. §§ 3839aa-3839aa-9 | 8, 13 |
| § 2505, 116 Stat. 274, *codified as amended*, 16 U.S.C. § 1012(h) | 13 |


FLA. STAT. ANN. (WEST)


| | |
|---|---|
| Art. IV, § 4(f), Fla. Const | 3 |
| § 20.14(1), Fla. Stat. (2002) | 3 |
| § 373.1501, Fla. Stat. (2002) | 14 |
| § 373.4592, Fla. Stat. (Supp. 2003) | 15 |
| § 373.4592(4), Fla. Stat. (Supp. 2003) | 15 |
| § 373.4592(6), Fla. Stat. (Supp. 2003) | 4, 15, 21 |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| § 373.4592(9), Fla. Stat. (Supp. 2003) | 16 |
| § 373.4595, Fla. Stat. (2002) | 14 |
| § 373.4595(3)(c), Fla. Stat. (2002) | 15 |
| § 373.503, Fla. Stat. (2002) | 4, 21 |
| § 403.031(21), Fla. Stat. (2002) | 10 |
| § 403.067, Fla. Stat. (1999) | 10 |
| § 403.067(2-5), Fla. Stat. (2002) | 10 |
| § 403.067(7), Fla. Stat. (2002) | 10, 11, 13 |
| § 403.0885, Fla. Stat. (2002) | 17 |
| § 570.07(13), Fla. Stat. (2002) | 3 |
| § 570.074, Fla. Stat. (2002) | 3, 11 |
| § 570.075, Fla. Stat. (2002) | 3, 11 |
| § 604.001(2), Fla. Stat. (2002) | 3 |
| § 604.001(5), Fla. Stat. (2002) | 3 |


REGULATIONS AND RULES


| | |
|---|---|
| 40 C.F.R. § 122.3(e) | 18 |
| *Florida Administrative Code* | |
| Rule 5E-1.023(4), Fla. Admin. Code | 12 |
| Rule 5E-1.023(5), Fla. Admin. Code | 13 |
| Ch. 5M-2, Fla. Admin. Code | 12 |
| Ch. 5M-3, Fla. Admin. Code | 12 |
| Ch. 62-303, Fla. Admin. Code | 10 |
| Ch. 40E-63, Fla. Admin. Code | 16 |


OTHER AUTHORITIES


| | |
|---|---|
| 29 Fla. Admin. Weekly 3328-3329 (Aug. 22, 2003) | 12 |
| 117 Cong. Rec. 38825 (1971) | 6 |
| 123 Cong. Rec. 26697 (1977) | 7 |
| S. Rep. No. 95-217, 95th Cong., 1st Sess. 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360 | 19 |
| S. Rep. 92-414 at 3759 | 19 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| S. Rep. 92-414, *reprinted in* 1972 U.S.C.C.A.N. at 3759-3760 | 18 |
| S. Rep. No. 414, 92d Cong., 1st Sess. 139, ("S. Rep. 92-414"), *reprinted in* 1972 U.S.C.C.A.N. 3668. | 5, 18 |
| Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (May 1977) | 7 |


IN THE

# Supreme Court of the United States

No. 02-626

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR *AMICI CURIAE* FLORIDA FRUIT AND VEGETABLE ASSOCATION, FLORIDA FARM BUREAU FEDERATION, AMERICAN FAM BUREAU FEDERATION, and CHARLES H. BRONSON, as the FLORIDA COMMISSIONER OF AGRICULTURE IN SUPPORT OF PETITIONER

With the written consent of the parties given and filed with the Clerk of the Court, the American Farm Bureau Federation ("Farm Bureau"), Florida Farm Bureau Federation ("FFBF"), the Florida Fruit and Vegetable Association ("FFVA"), and Charles H. Bronson, the Florida Commissioner of Agriculture of the State of Florida ("Commissioner") respectfully submit this brief as amici curiae[1].

[1] Counsel for *amici curiae* has authored this brief in whole and no other person or entity other than *amici*, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

## INTEREST OF *AMICI CURIAE*

The FFVA is a non-profit, agricultural trade organization headquartered in Orlando, Florida. Its mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. The FFVA represents and assists its membership on a broad range of farming issues, including environmental protection, marketing, labor, food safety, and pest management. These services help Florida growers set the standard for competitively producing an abundant supply of safe and affordable, fruits, vegetables and other crops. Its members produce much of the winter vegetable crop for the United States.

The Farm Bureau is a not-for-profit, voluntary general farm organization incorporated in Illinois in 1920. It was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in all 50 states and Puerto Rico, representing more than five million member families.

FFBF is one of the constituent members of the Farm Bureau. It represents the interests of farmers and ranchers in Florida. FFBF is composed of 62 county farm bureaus with more than 143,400 member families. It is headquartered in Gainesville, Florida.

American farmers and ranchers represented by the FFVA, FFBF, and the Farm Bureau own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fiber and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and in some instances, eliminate that ability altogether.



The Commissioner supervises all matters pertaining to agriculture in the State of Florida, pursuant to Article IV, Section 4(f) of the Florida Constitution, except as otherwise provided by law. The Commissioner is also the head of the Florida Department of Agriculture and Consumer Services ("DACS") under Section 20.14(1), Florida Statutes (2002), and is statutorily charged with the duty to "protect the agricultural and horticultural interests of the state" under Section 570.07(13), Florida Statutes (2002).

The Florida Legislature has declared the production of agricultural commodities in this state to be a "large and basic industry that is important to the health and welfare of the people and to the economy of the state." § 604.001(2), Fla. Stat. (2002). The Legislature has further declared that it is important "that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable." § 604.001(5), Fla. Stat. (2002). Finally, under Sections 570.074-.075, Florida Statutes (2002), the Commissioner has created and oversees an Office of Agricultural Water Policy ("OAWP") for the purpose of engaging in any matter "relating to water policy affecting agriculture, application of such policies, and coordination of such matters with state and federal agencies."

The Commissioner's participation in this matter flows from his constitutional and statutory duty to protect Florida agricultural food products and the interests of all Florida citizens involved in or affected by issues impacting the continued viability of agricultural operations in the state.

American farm products remain competitive in the world market due in part to the regulatory scheme of one environmental law, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. The CWA does this by providing agricultural exemptions for the discharge of waters used for the pro-

duction of crops. 33 U.S.C. §§ 1342(l) and 1362(14). These exemptions are part of the National Pollutant Discharge Elimination System ("NPDES") component of the CWA, a permit program to limit the discharge of industrial wastes into the nation's waters. 33 U.S.C. § 1342.

If the Eleventh Circuit's decision stands, the South Florida Water Management District ("SFWMD") will have to increase its budget to pay for the expensive NPDES permitting process for S-9, the pump station that moves water from one side of a levee to the other in the same watershed. SFWMD will more than likely obtain the funding to obtain and implement this NPDES permit by increasing agriculture privilege taxes, ad valorem taxes on property owners in the district, fees, and assessments. *See, e.g.*, § 373.4592(6), Fla. Stat. (Supp. 2003) (agricultural privilege tax) and § 373.503, Fla. Stat. (*ad valorem* tax). The costs may be further magnified by the SFWMD having to take steps to permit many other structures or facilities similarly situated to the S-9 facility.

These likely additional costs to farmers and ranchers would significantly and adversely impact the ability of farmers and ranchers in Florida to competitively market their crops in today's international markets. It is possible the technologies required by the NPDES permit for S-9 will compel the creation of stormwater treatment areas for it and other similar types of facilities. If that is the case, SFWMD may use its condemnation power to take the land of farmers and ranchers, thereby further adversely impacting them.

The Commissioner and the farmer and rancher members in the FFVA and FFBF have a direct economic interest in the outcome of this case. The interest is to ensure the agricultural exemptions provided by the Clean Water Act from the NPDES program continue to be effectively implemented as in the past. If the Eleventh Circuit's decision is not reversed, the effective impact of the Clean Water Act agricultural



exemptions could be eroded and thwarted through increased taxes, fees and/or assessments imposed by SFWMD to pay for NPDES permits and technologies for the S-9 pump station or similar facilities.

SFWMD's hundreds of other pumps and flow diversion facilities like them that move water within the same watershed will likely also require NPDES permits, all at a substantial cost the SFWMD will pass on to farmers, ranchers, and others. In addition, regulatory agencies that manage the transfer of water within watersheds throughout the country may also have to obtain NPDES permits if the Eleventh Circuit's decision is affirmed. Accordingly, the impact of the Eleventh Circuit's decision could adversely impact the cost of producing crops throughout Florida and nationally. The predictable result will be a diminished ability of American farmers and ranchers to market their crops in the international market in which they can now compete.

## ARGUMENT

### I. THE CLEAN WATER ACT AUTHORIZES STATE PROGRAMS TO ADDRESS NONPOINT SOURCES OF POLLUTION NOT COVERED BY THE NPDES PROGRAM.

#### A. Framework of the CWA

The NPDES program did not cover nonpoint sources when the CWA amendments were adopted in 1972. Instead, nonpoint sources were left to the states to address through planning processes. Pub. L. 92-500, § 208 (1972); 86 Stat. 816, 839-841, *codified as amended*, 33 U.S.C. § 1288; S. Rep. No. 414, 92d Cong., 1st Sess. 139, ("S. Rep. 92-414"), *reprinted in* 1972 U.S.C.C.A.N. 3668. As explained below, that is still true today.

Since its enactment, the CWA has divided water pollution sources into two categories, point and nonpoint. Point

sources are subject to the NPDES program, a federal permit scheme which is administered by the United States Environmental Protection Agency ("EPA") or by a state which has received EPA's authorization. *See* 33 U.S.C. §§ 1311 and 1342(a and b). The term "point source" is defined in 33 U.S.C. § 1362(14). Nonpoint sources are not subject to a CWA permit system. *Natural Resources Defense Council v. EPA,* 915 F.2d 1314,1316 (9th Cir. 1990).

Indeed, nonpoint sources are addressed under a separate scheme that recognizes their important differences. *See* 33 U.S.C. §§ 1288 and 1329. By the early 1970s Congress had realized that "[t]here is no effective way as yet, other than land use control, by which you can intercept that runoff and control it in the way you do a point source." 117 Cong. Rec. 38825 (1971) (Sen. Muskie). Since land use controls have historically been the concern of state and local government, Congress did not subject nonpoint sources to any federal regulation. As one court has explained, the 1972 Federal Water Pollution Control Act Amendments to the CWA:

> drew a distinct line between point and nonpoint pollution sources. Point sources are subject to direct federal regulation and enforcement under the Act. 33 U.S.C. § 1342. Nonpoint sources, because of their very nature, are not regulated under the NPDES. Instead, Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages States to develop area wide waste treatment management plans. See 33 U.S.C. § 1288 [footnotes omitted] . . .

*Oregon Natural Resources Council v. Untied States Forest Service*, 834 F.2d 842, 849 (9th Cir. 1987); *see also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 371-73 (10th Cir. 1979) (nonpoint sources are not subject to a "regulatory system"). Congress revisited the matter of nonpoint sources regulation in 1977, and decided to "continu[e] the section 208, 33 U.S.C. § 1288 experiment . . . judging that these



[nonpoint source] matters were appropriately left to the level of government closest to the sources of the problem." 123 Cong. Rec. 26697 (1977).

This minimal federal involvement with nonpoint sources under Section 208 of the CWA, 33 U.S.C. §1288, was broadened somewhat in 1987 with the addition of Section 319, 33 U.S.C. § 1329, Nonpoint Source Management Programs. Section 319 continues to recognize that nonpoint source control is first and foremost a matter of land use control, and continues to respect state primacy in that field. Under Section 319, states are directed to prepare "management programs" that identify "best management practices" for various categories of nonpoint sources. 33 U.S. C. § 1329(b). Each management program must identify "best management practices which will be undertaken to reduce pollutant loading" and how the program will "achieve implementation" of them. 33 U.S.C. § 1329(b)(2)(A and B).

The CWA creates a framework that accommodates the interests Congress had to balance when it addressed point and nonpoint sources and their effects on water quality. It brings the full regulatory authority of the federal government to bear on point sources; it leaves nonpoint sources to state and local governments. Control of nonpoint sources inevitably implicates land use controls and accordingly Congress deferred to state and local primacy in that area. Congress struck a balance on this issue, as it does routinely on legislation of all kinds. That balance divides responsibility for point and nonpoint sources between EPA and the states, respectively.[2]

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[2] Prevailing views of federalism evolve over time, but the problems of environmental regulation within a federal framework, as the sometimes complex compromises that emerge, are nothing new. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (May 1977).

Nonpoint sources must do their part, but through state-driven programs.

### B. Conservation—National View

The Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, 116 Stat. 134-540 ("Farm Act"), supported large funding increases in conservation programs to assist farms of all sizes improve water quality. The Farm Act increased funding for almost every existing agri-environmental program. Overall spending for conservation and environmental programs will rise by 80 percent to a projected 10-year total of $38.6 billion. This funding responds to a broad range of natural resource challenges faced by farmers and ranchers and will focus on the soil, water and air impacts of farming.

The Environmental Quality Incentives Program ("EQIP") of the Farm Act, 116 Stat. 253-258, *codified as amended*, 16 U.S.C. §§ 3839aa-3839aa-9, provides technical and financial assistance to landowners to improve soil, water, air, wetlands and wildlife management. Started in the 1996 at $200 million annually, the increased demand for the program by farmers resulted in the expansion of total funding to $5.8 billion through 2007.

A new approach authorized in the Farm Act is to provide technical and financial assistance for the conservation and protection of natural resources on private working lands. The Conservation Security Program of the Farm Act offers assistance to all producers who practice good stewardship on their farms and provides incentives to help cover the costs for those who want to add additional conservation practices. 116 Stat. 225-230, *codified as amended,* 16 U.S.C. § 3838a. These and many other United State Department of Agriculture natural resource conservation programs follow the voluntary, incentive-based model that farmers have supported starting with the soil conservation programs of the 1930's.



Approaches that include the agricultural community in their design and execution, that are based on local decision-making, and that produce results while complementing the goals of the farm business, have proven useful in achieving natural resource protection for agriculture. Producing food and fiber for the nation and the world, improving environmental practices on working lands, and maintaining a sound economic base for current and future farm businesses are the multiple goals that farmers and the public are striving to achieve.

### C. Florida Programs Addressing Nonpoint Sources of Pollution

As set forth above, the CWA authorizes states to develop and implement plans to address nonpoint sources (*e.g.* 33 U.S.C. §1329(b)(2)(B)—states develop best management practices and measures to reduce pollutant loading; and 33 U.S.C. §1329(h)(2)—federal grants are provided for state programs addressing nonpoint-source pollution) and in some instances requires states to implement controls on these sources (*e.g.*, 33 U.S.C. §1342(d)—states must limit the total maximum daily loads of pollutants discharged into impaired water bodies from nonpoint and point sources).

Pursuant to the CWA, the Florida Legislature has adopted several programs to address the introduction of pollution into navigable waters from nonpoint sources. In addition, regional cooperative programs have similarly implemented procedures for this purpose. Several of these programs are described below. The Commissioner, agricultural interests, and others have worked cooperatively to implement these programs through the establishment of best management practices ("BMPs"). The goal of these cooperative efforts is to limit the flow of pollutants into navigable waters, whether from point or nonpoint sources.

1. *Florida's TMDL Program*

The Florida Watershed Restoration Act, Section 403.067, Florida Statutes, was adopted by the Florida Legislature in 1999. Implementation of this law is expected to result in cleaner water though collaborative restoration efforts, better protection of water bodies, and better working relationships among public and private sectors to reduce pollution. Substantial funding is being provided by the Legislature to implement the act. To accomplish these purposes, the law requires the establishment of the total maximum daily load ("TMDL") of pollutants that can flow into impaired surface waters or segments. A TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. *See* § 403.031(21), Fla. Stat. (2002). This program is mandated by the NPDES program of the CWA. 33 U.S.C. § 1342(d) ("Section 303(d)").

The Florida Department of Environmental Protection ("FDEP") is the lead agency to implement the TMDL law. In that capacity, it adopted comprehensive impaired water rules in 2001. Ch. 62-303, Fla. Admin. Code. These rules became effective on June 10, 2002, when they were upheld in a 468-page final order; the order was affirmed on appeal in 2003. *Lane et al. v. Florida Department of Environmental Protection*, Case Nos. 1D02-2043 and 1D02-2319 (Fla. 1st DCA, May 20, 2003). FDEP had previously adopted a list of impaired waters ("Section 303(d) list"), as required by the CWA; EPA Region 4 approved this list in 1998. This list will be updated using the assessment standards in the recent TMDL law and implementing rules. §403.067(2-5), Fla. Stat.

The Florida TMDL program also requires FDEP to calculate TMDLs, allocate TMDLs, and verify the effectiveness of proposed BMPs to reduce pollution in impaired waters or segments. The program specifically addresses agriculture-related water quality problems in Section 403.067(7)(d),



Florida Statutes (2002). This provision allows voluntary, incentive-based agriculture-related programs which reward implementation of BMPs. It authorizes the Florida Department of Agriculture and Consumer Services ("DACS") to develop alternative processes (other than having a TMDL developed) and regulatory approaches to achieve water quality improvement through the reduction of agricultural-related pollutants. Section 403.067(7)(d) has enabled the Commissioner and many local agencies and regulated interests (including FFVA and the FFBF) to work cooperatively together to develop agriculture-related BMPs and programs. If farmers and ranchers implement BMPs verified by FDEP, they receive "a presumption of compliance with state water quality standards". § 403.067(7)(d)(1), Fla. Stat. (2002).

One of the prioritized impaired water bodies on FDEP's 303(d) list is Lake Okeechobee. The Florida Legislature adopted a special law to address the reduction of pollutants flowing into this water body (see Section C(4), below).

2. *Florida's Office of Agricultural Water Policy*

The Office of Agricultural Water Policy ("OAWP") is part of the Florida Department of Agriculture and Consumer Services ("DACS"). It was established in 1995 by the Florida Legislature to facilitate and improve communications between federal, state, local agencies and the agricultural industry on water quantity and quality issues. *See* §§ 570.074-.075, Fla. Stat. (2002). OAWP is actively involved in the development of BMPs on a site-specific, regional and watershed basis. OAWP works cooperatively with agricultural producers and industry groups, FDEP, the university system, the water management districts, and other interested parties to develop and implement BMP programs that are economically and technically feasible. OAWP has a staff of 37 employees, including six technical field teams and 18 professionals. This staff has expertise in disciplines including soil and water conservation, resource management,

environmental regulation, biology, ecology, engineering and GIS. Following are some examples of BMPs implemented through OAWP programs.

OAWP facilitated the adoption of BMPs for the Indian River citrus groves in seven counties, including Okeechobee County. Ch. 5M-2, Fla. Admin. Code. Rule 5M-2.002 incorporates by reference the document, titled Water Quality/ Quantity BMPs for Indian River Area Citrus Groves (May 2000), which contains the BMPs. Indian River growers have voluntarily enrolled 179,843 acres in this program, covering 82% of potential acreage. OAWP has similarly coordinated the development of nitrogen BMP rules for Florida Ridge Citrus (covering ten counties) and Leatherleaf Fern growers. Rule 5E-1.023(4)(a and b), Fla. Admin. Code.

OAWP has also facilitated the development of BMP manuals for silviculture, cow/calf, blended fertilizer plants, aquaculture, and agrichemical equipment. The BMP rule for citrus, cow/calf, dairies and other agriculture in the Lake Okeechobee priority basins has been noticed for adoption. Ch. 5M-3, Fla. Admin. Code; *see* 29 Fla. Admin. Weekly 3328-3329 (Aug. 22, 2003). Even before the adoption of the TMDL law, OAWP assisted in the development of BMPs along the Suwannee River (*see* Section C(3) below).

3. *Suwannee River Partnership*

The Suwannee River Partnership ("Partnership") is a coalition of 24 state, federal and regional agencies, local governments, and private industry representatives formed in 1999 to work together to reduce nitrate levels in the surface waters and ground water within the watershed. Partners include the DACS, FFBF, FDEP, Florida Department of Health, EPA, United States Department of Agriculture, University of Florida Institute of Food and Agricultural Sciences, Extension and Research, Florida Agriculture and Mechanical University, College of Engineering Sciences,



Technology, and Agriculture, Florida Cattlemen's Association, Florida Forestry Association, Florida Septic Tank Association, Gold Kist, Inc., and Sunshine State Milk Producers. In 2003, the Partnership expanded to include the Santa Fe River Basin.

The Partnership determines the sources of nutrient loads to these river basins and then develops voluntary incentive-based programs to minimize nutrient loading. Through these voluntary efforts, nitrate levels have been substantially reduced in the Middle Suwannee and Santa Fe River basins. Initially, technical committees developed specific plans to reduce nutrient loading to the water resources through the management of fertilizers, animal wastes and human waste, monitoring, and education and outreach. The group focused on finding the most economical and technologically feasible management techniques (BMPs) available to help farmers and other land users satisfy regulatory requirements for protecting public health and the environment. In its third year (2002), the Partnership developed "reasonable assurance" documentation to demonstrate to the satisfaction of FDEP and EPA that its watershed management programs address water quality concerns in the Suwannee River basin. Farmers who use the BMPs adopted by the Partnership can receive a presumption of compliance with Florida's TMDL law. §403.067(7)(d)(1), Fla. Stat. (2002). Some of the BMPs have been adopted as rules. *See* Rule 5E-1.023(5)(b), Fla. Admin. Code.

In 2002, over 1000 growers and producers attended one or more of the many meetings and special events hosted by the Partnership. The Natural Resources Conservation Service provides technical assistance and incentives for farmers to implement effective BMPs through the Small Watershed Program and the Environmental Quality Incentive Program, both programs in the Farm Act of 2002. 116 Stat. 274, *codified as amended*, 16 U.S.C. § 1012(h); and 116 Stat. 253-

258, *codified as amended*, 16 U.S.C. §§ 3839aa-3839aa-9. These programs have provided $17 million in cost-share funding to implement water quality oriented BMPs. The Partnership researches the effectiveness of BMPs through its BMP Effectiveness 319 Demonstration Project at three separate commercial agricultural operations.

4. *Florida's Lake Okeechobee Protection Program*

In 2000, the Florida Legislature enacted the Lake Okeechobee Protection Program. § 373.4595, Fla. Stat. (2002). The program's purpose is the protection and restoration of Lake Okeechobee and the protection of public water resources in the Lake Okeechobee watershed. By this enactment, the state recognized the prioritized status of Lake Okeechobee on the Section 303(d) list. The program's coordinating agencies are DACS, SFWMD, and FDEP. The United States Army Corps of Engineer's Central and Southern Florida Flood Control Project manages this responsibility, under the local sponsorship of SFWMD. § 373.1501, Fla. Stat. (2002).

Under this program, an integrated watershed and Lake Okeechobee management strategy is being developed. Professionals believe the use of BMPs as part of a voluntary, non-regulatory process, should effectively control phosphorus when implemented at the parcel-scale level. At this level, individual landowners will reduce the amount of phosphorus migrating off their parcels of land. OAWP is also working with other agencies and agricultural interests to develop a voluntary program for other agricultural activities including cow/calf operations, vegetables, and citrus, modeled on the success of the citrus BMP efforts in the Indian River Lagoon watershed (*see* Section C(2), above).



The Lake Okeechobee Watershed Phosphorus Control Program, a component of the program, is described in Section 373.4595(3)(c), Florida Statutes (2002) as:

> a multifaceted approach to reducing phosphorus loads by improving management of phosphorus sources within the Lake Okeechobee watershed through continued implementation of existing regulations and best management practices, development and implementation of improved best management practices, improvement and restoration of the hydrologic function of natural and management systems, and utilization of alternative technologies for nutrient reduction . . .

The Commissioner and agricultural interests work cooperatively to develop rules which identify BMPs and best available technologies for nonpoint agricultural sources in the Lake Okeechobee watershed. § 373.4595(3)(c), Fla. Stat. (2002) The program provides that DACS in consultation with other agencies "shall institute a reevaluation of the best management practices and make appropriate changes" when "water quality problems are detected for agricultural nonpoint sources despite the appropriate implementation of adopted best management practices." § 373.4595(3)(c)(1)(d), Fla. Stat. (2002).

5. *Florida's Everglades Forever Act*

The 1994 Everglades Forever Act ("EFA") has been approved by EPA as a part of Florida water quality standards. § 373.4592, Fla. Stat. (Supp. 2003). In the Everglades Agricultural Area ("EAA"), the EFA requires the implementation of BMPs. § 373.4592(4)(f), Fla. Stat. (Supp. 2003). The Everglades agricultural privilege tax imposed on Everglades agriculture provides incentive credits against this tax to encourage farmers and ranchers to use BMPs to reduce phosphorus loads. § 373.4592(6)(c)(2), Fla. Stat. (Supp. 2003). Credits can be earned if they reduce total phosphorus runoff from their land by at least 25%. §373.4592(6)(c)(3),

Fla. Stat. (Supp. 2003); *see also* Ch. 40E-63, Parts III and IV (Everglades Program—BMP Research, Testing and Implementation and C-139 Basin), Fla. Admin. Code. Recently, SFWMD announced a 35% phosphorus reduction from the water exiting the EAA south of Lake Okeechobee from C-139 basin.

There are many components in the EFA's complex system managing the water in the Lake Okeechobee watershed, one of which is the S-9 pump. S-9 operates in compliance with a permit issued by FDEP under the EFA. § 373.4592(9)(k and l), Fla. Stat. (Supp. 2003).

6. *Summary*

In view of the above, Florida is implementing varied and complex mechanisms (*e.g.* TMDLs and BMPs) to protect and restore Florida's water bodies. The Lake Okeechobee and Everglades watershed is the beneficiary of many of these cooperative programs designed to address nonpoint sources of pollution. Accordingly, there is no need, or authority, to ignore state primacy as clearly provided in the CWA. Yet that is the effect of the Eleventh Circuit's decision.

## II. THE ELEVENTH CIRCUIT'S DECISION WOULD HAVE THE EFFECT OF OVERRIDING THE AGRICULTURAL EXEMPTIONS PROVIDED BY THE CLEAN WATER ACT AND THE NPDES PROGRAM.

### A. Agricultural Exemptions

The CWA prohibits the discharge of pollutants into the navigable waters of the United States unless the discharge is allowed by the NPDES component of the CWA. 33 U.S.C. § 1311(a); *see Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1524-1525 (11th Cir. 1996). Permits for discharges into the nation's waters are issued by EPA or by delegated state



permitting programs. 33 U.S.C. §§ 1342(a) & 1342(c). EPA authorized FDEP to administer the NPDES program in 1995. § 403.0885, Fla. Stat. (2002).

The NPDES program does not require permits for the introduction of pollutants into the waters of the United States that are the result of exempt agricultural activities. The CWA expressly provides exemptions for these agricultural discharges. 33 U.S.C. §§ 1342(l) and 1362(14). The FFVA, FFBF, Farm Bureau, and Commissioner seek to prevent a fundamental change in the implementation of these agricultural exemptions which the Eleventh Circuit's expansive decision appears to authorize contrary to the CWA.

The NPDES program limits the flow of pollutants into the nation's waters by regulating discharges from "point sources." Certain agricultural discharges are excluded by definition from regulation by the NPDES program because they are not "point sources". A "point source" regulated by the NPDES program is defined in 33 U.S.C. §1362(14) as follows (emphasis added):

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*

The NPDES program expressly prohibits any permit requirements for these agricultural discharges, stating in 33 U.S.C. § 1342(l):

> The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly require any State to require such a permit.

The rules implementing the agricultural exemptions explain what is and is not a "point source" under the statutory definition of the NPDES program. The rules provide, for example, that the following discharges from agriculture do not require NPDES permits:

> Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands. . . .

40 C.F.R. § 122.3(e)

### B. Legislative History of the Agricultural Exemptions

The CWA originated in the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* The CWA focused on regulating "point source" discharges which flow into the nation's navigable waters. The 1972 amendments required effluent limitations to be placed upon "point source" discharges through a federally mandated permit system, the NPDES program. Pub. L. 92-500, § 402; 86 Stat. 816, 880-883 (1972), *modified as amended* 33 U.S.C. § 1342.

The NPDES program did not cover nonpoint sources when the CWA was adopted in 1972. Instead, these sources, particularly agriculture, were left primarily to the states to address through a planning process described in the program. Pub. L. 92-500, § 208 (1972); 86 Stat. 816, 839-841, *codified as amended*, 33 U.S.C. § 1288; S. Rep. No. 414, 92d Cong., 1st Sess. 139, ("S. Rep. 92-414"), *reprinted in* 1972 U.S.C.C.A.N. 3668. As a consequence, when Congress adopted the NPDES program, it did not require a permit for agricultural runoff. Pub. L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (1972), *codified as amended*, 33 U.S.C. § 1288(b)(2)(F); S. Rep. 92-414, *reprinted in* 1972 U.S.C.C.A.N. at 3759-3760. As Senator Dole stated: "This



bill would amend the Federal Water Pollution Control Act to place responsibility on the states for instituting and expanding the control of water pollution related to agriculture." S. Rep. 92-414 at 3759 (supplemental views of Sen. Dole).

In 1977, the exemption for "return flows from irrigated agriculture" was expressly added as an exclusion from the definition of "point source". Pub. L. 95-217, § 33(b); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1362(14). Also, the provision prohibiting NPDES permits for agricultural discharges was added. Pub. L. 95-217, § 33(c); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1342(l). The express exclusion from the definition of "point source" overrode a 1975 federal district court opinion holding the 1972 amendments to the Federal Water Pollution Control Act did not exclude point sources from agriculture from NPDES permitting. *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *affirmed sub nom. Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977). The legislative history reveals Congressional intent that all sources of agricultural runoff, "regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F)." S. Rep. No. 95-217, 95th Cong., 1st Sess. 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360.

The exemption for "agricultural stormwater discharges" from the definition of "point source" was added by the Water Quality Act of 1987. Pub. L. No. 100-4, § 503; 101 Stat. 7, 75 (1987), *codified as amended*, 33 U.S.C. § 1462(14). By this exemption, Congress confirmed its intent that agriculture is not covered as industrial or municipal pollution under 33 U.S.C. § 1342(p).

A recent Eleventh Circuit case interpreted and applied the agricultural exemptions from the NPDES program.

*Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002). In that case, Closter Farms irrigated sugar cane by irrigation canals, a process called flood irrigation. The canal water originates in Lake Okeechobee. It is forced from the canals "into the sugarcane fields by raising the water levels in the canals." *Id.* at 1297. The water is then discharged back into the lake. The grower also pumped its stormwater into Lake Okeechobee, rather than allowing it to follow its natural flow. The Eleventh Circuit held these discharges to the lake were covered by the agricultural exemptions from NPDES program regulation. As to the diversion of stormwater runoff to the lake, the court held: "Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow. *See* 33 U.S.C. § 1362(14)." *Id.* at 1297. The court also held that the canals used to irrigate the sugar cane fields through flood irrigation constituted an exempt activity; they were a "return flow from irrigation agriculture," and accordingly expressly exempt from the definition of "point sources" regulated by the NPDES program. 33 U.S.C. §1362(14).

### C. Effect of Eleventh Circuit's Decision on the Agricultural Exemptions

If the Eleventh Circuit's decision is allowed to stand, SFWMD will have to treat the water pumped at S-9 in order to remove some of the pollutants in it, none of which have been added by SFWMD. This water may contain pollutants from agricultural discharges exempt by definition from the NPDES program's definition of "point source."

The treatment of water at S-9 will be expensive. Just the preparation of the NPDES application will be costly, requiring detailed data and modeling prepared by experts. In addition, SFWMD will have to construct and implement treatment and monitoring technologies required by the resulting NPDES permit, assuming there are such technologies.



SFWMD will bear the cost of the NPDES permitting process, as well as cost of the installation and monitoring technologies to treat the water at the S-9 pump station. The regulatory agency will have to pay for these substantial costs by increasing one or more of its funding sources. These sources include ad valorem taxes on properties within the SFWMD's jurisdiction, agricultural privilege taxes, permit fees, and assessments. *See, e.g.*, § 373.4592(6), Fla. Stat. (Supp. 2003) (agricultural privilege tax) and § 373.503, Fla. Stat. (2002) (*ad valorem* tax). Farmers and ranchers who own farms, groves and ranches in the jurisdiction of SFWMD may therefore have to pay for the removal of pollutants required by an NPDES permit for S-9, even though agricultural discharges to the waters pumped by S-9 are exempt from the NPDES permitting program. Consequently, the benefits of the agricultural exemptions may be effectively overridden by the Eleventh Circuit's decision.

The additional regulatory costs created by the NPDES permit for S-9 may be passed on to farmers and ranchers, and may increase the costs of producing agricultural products, resulting in a diminished ability to be competitive in the world market. As a consequence, the economic benefits realized from the agricultural exemptions would be substantially eroded. If the Eleventh Circuit's decision stands, S-9 will be just one of many SFWMD pumps that may be required to have NPDES permits. The adverse economic impact on farmers and ranchers could be enormous. If the decision is applied statewide and nationally, thousands of pumps operated by agencies transferring water within watersheds will similarly be required to pass on to farmers and ranchers the expensive costs of NPDES permitting.

## CONCLUSION

The judgment of the Eleventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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In the

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

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## QUESTION PRESENTED

Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

## TABLE OF CONTENTS


Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICUS CURIAE ..... 1

INTRODUCTION ..... 2

STATEMENT OF FACTS ..... 3

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 6

PETITIONER'S PUMPING OF NONPOINT SOURCE GENERATED WATER FROM ONE SIDE TO THE OTHER SIDE OF A LEVEE THAT DIVIDES A NATURAL WATER BODY DOES NOT TRIGGER THE NEED FOR AN NPDES PERMIT UNDER THE CLEAN WATER ACT ..... 6

A. The Eleventh Circuit's Decision Ignores Express Provisions of the Clean Water Act and Eschews the Principles of Federalism Embodied in the Clean Water Act by Stripping States of Their Land Use and Water Resources Planning Responsibilities .... 6

B. The South Florida Water Management District's Flood Protection System for Broward County Does Not *Add* a Pollutant to Navigable Waters But Instead Redirects Nonpoint Source, State Managed Runoff Throughout a Single Watershed ..... 11

CONCLUSION ..... 15


BEST AVAILABLE COPY



## TABLE OF AUTHORITIES


Page

**Cases**

*Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976) ..... 13

*Arkansas v. Oklahoma*, 503 U.S. 91 (1992) ..... 8

*Borden Ranch Partnership v. United States Army Corps of Engineers*, 537 U.S. 99 (2002) ..... 1

*California v. United States*, 438 U.S. 645 (1978) ..... 9

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... 14

*Committee To Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993) ..... 14

*Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) ..... 14

*Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976) ..... 8

*ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988) ..... 10

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) ..... 1

*Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000) ..... 14

*Hanousek v. United States*, 528 U.S. 1102 (2000) ..... 1

*Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981) ..... 1

**TABLE OF AUTHORITIES—Continued**


Page

*Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002) ..... 3-4

*National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) ..... 12-13

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... 12

*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ..... 1, 10-11

*United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) ..... 6

*United States v. Lopez*, 514 U.S. 549 (1995) ..... 10

*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... 1


**Statutes**


33 U.S.C. § 1251(b) ..... 10, 15

§ 1288 ..... 7-8

§ 1311 ..... 8, 11

§ 1311(a) ..... 12

§ 1311(b) ..... 8

§ 1311(c) ..... 8

§ 1313(d) ..... 7, 9

§ 1313(d)(3) ..... 9

§ 1313(e) ..... 9




**TABLE OF AUTHORITIES—Continued**


Page

§ 1314(f) ..... 4, 7

§ 1314(f)(2)(F) ..... 4

§ 1329 ..... 7-8

§ 1329(a) ..... 9

§ 1329(b) ..... 9

§ 1329(h) ..... 9

§ 1342 ..... 4

§ 1362(12) ..... 12

§ 1362(14) ..... 6-7

§ 1288 ..... 7

Fla. Stat. § 373.4592 (2003) ..... 15

§ 373.4595 (2003) ..... 11

§ 403.0885 (2003) ..... 8


**Supreme Court Rules**


Rule 37.3(a) ..... 1

37.6 ..... 1


**Miscellaneous**


Bartfeld, Esther, *Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 Envtl. L. 43 (1993) ..... 6

Leshy, John D., *Natural Resources Policy in the Clinton Administration: A Mid-Course Evaluation from Inside*, 25 Envtl. L. 679 (1995) ..... 8

**TABLE OF AUTHORITIES—Continued**

Page

Vergura, Jim & Jones, Ron, *The TMDL Program: Land Use and Other Implications*, 6 Drake J. Agric. L. 317 (2001) ..... 9



## INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioner. Written consent for amicus participation in this case was granted by counsel of record for all parties and has been lodged with the Clerk of the Court.[1]

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated as amicus curiae in numerous cases before this Court concerning the statutory interpretation and constitutional application of a variety of federal environmental statutes including the Clean Water Act (CWA). For example, PLF participated as amicus curiae in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 537 U.S. 99 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); *Hanousek v. United States*, 528 U.S. 1102 (2000); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981).

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF seeks to augment the arguments of Petitioner by providing additional perspective and background on the regulatory scheme that is the subject of this case. For over 30 years, PLF attorneys have represented numerous parties from agricultural, home building, forestry, and related industries who must comply with the point source and nonpoint source permitting provisions of the Clean Water Act. For example, PLF attorneys currently represent the Hawaii Farm Bureau Federation in litigation brought under state law to stop interbasin water transfers needed by their members for crop irrigation. This case raises the possibility that unless the Eleventh Circuit's decision is reversed, water resources planning including flood control and water diversion programs, like the Hawaii program mentioned above, will no longer be the prerogative of state and local discretion, but instead will be the subject of federal oversight and intervention. This intervention may even lead to these programs only being able to operate if they build and operate very expensive water treatment systems. Such an interpretation of the CWA will have tremendous negative impacts on agriculture, home building, forestry, and related industries and is directly contrary to the cooperative federalist approach to clean water planning that forms the underlying premise of the CWA.

## INTRODUCTION

This case will affect municipalities, flood control agencies, water districts, dam operators, and all other local entities that have the responsibility to plan land uses and manage water resources for the benefit and protection of the public. Must these local entities obtain restrictive, *federally* controlled Clean Water Act pollutant discharge permits in order to do their jobs? A careful look at the CWA shows that Congress never intended the federal government to take control of these vital land use planning and water management responsibilities from state and local entities. Nevertheless, the Eleventh Circuit's decision in this case says these entities must submit to federal control by



first obtaining federal pollutant discharge permits. That decision is wrong and should be overturned.

## STATEMENT OF FACTS

This case arose in a challenge to the South Florida Water Management District's (District) operation of the Central and Southern Florida Flood Control Project (Project).[2] As part of the Project, the District manages the flow of water across the Lake Okeechobee watershed[3] to keep some areas from flooding and ensure other areas receive adequate water supplies. At issue in this case are the areas now called the C-11 Basin and Water Conservation Area - 3A (WCA-3A). Both were originally part of one large water body and are part of the Everglades. The C-11 basin, home to the 48,000-acre, heavily populated and farmed Western Broward County, is now separated from the 491,000-acre, WCA-3A water conservation area by two levees known as L-33 and L-37. The purpose of this separation is to allow a ditch, known as the C-11 Canal, to help drain the western portion of Broward County westward into WCA-3A. *See Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364, 1366 (11th Cir. 2002). The S-9 pump station pumps this water out of the C-11 basin through three pipes that run from the C-11 Canal through the L-33 and L-37 levees into WCA-3A. *Id.*

The movement of water collected by the C-11 Canal to WCA-3A is the subject of this lawsuit. The water collected on the east side of L-33 and L-37, the C-11 Basin side, has a higher

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[2] This Project involves 391 water diversion structures consisting of pumping stations incorporated with 1,800 miles of canals and levees. Petition for a Writ of Certiorari (Pet.) at 4; http://www.sfwmd.gov/histo/2_history.html at 1 (last visited Sept. 3, 2003). The Project controls water flow over 17,930-square miles of land in Florida. *Id.*

[3] The Lake Okeechobee watershed consists of a 16 county area from Orlando to Key West.

phosphorous content than the west side, the WCA-3A side. Despite this activity being part of an "eight billion-dollar joint federal and state effort . . . to restore the everglades while accommodating the region's competing urban and agricultural interests," Pet. at 9, Plaintiffs challenged the water diversion activities of S-9 as operating illegally because the District did not have a federally approved CWA National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342. *See Miccosukee*, 280 F.3d at 1367. The district court and the Eleventh Circuit Court of Appeals agreed with Plaintiffs, essentially federalizing the management of local surface water flows and the local land uses that accompany such management in contradiction of the language and intent of the CWA. *See* 33 U.S.C. § 1314(f)(2)(F).

As a result, state and regional water management agencies, local water districts, municipalities, dam operators, agricultural operations, and any other entity concerned with the necessary movement of water for flood control and water management purposes, face the sobering prospect, just like the District, of having to get a costly, highly restrictive, federally mandated NPDES permit to operate. This was never intended by the CWA.

## SUMMARY OF ARGUMENT

The Eleventh Circuit's decision requires a state agency that is diverting flood water containing phosphorous generated from agricultural and other land use activities to obtain a federal NPDES permit designed to control discharges from *point* sources. This decision is wrong. First, the CWA expressly identifies "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities" as nonpoint source land use activities that do not require federal NPDES permits, but are controlled by state authorities. 33 U.S.C. § 1314(f). This decision strips



Florida of its traditional responsibility, expressly recognized in the CWA, to control land use and manage water resources. The District's operation of its S-9 pump is expressly designed to promote municipal and agricultural land uses through the management of the water, yet the Eleventh Circuit's decision arrogates to the federal EPA discretion over land use and water management. Doing so not only violates the CWA, but also raises serious federalism issues.

Second, even if the District's operation of its S-9 pump were considered a point source activity, it is still not subject to NPDES permitting requirements. Because the need for an NPDES permit is only triggered if there is an *addition* of a pollutant from a point source to the nation's waters. The District employs numerous pumping plants and a thousand-mile system of ditches and levees to control water flow across the Everglades' landscape. This system is comprised of dam-like water diversion facilities that only move water from certain locations within one formerly inundated watershed area to other locations within the same watershed, to prevent flooding or supply water. Therefore, facilities *do not* themselves *add* any pollutants to the water, and do not need an NPDES permit.

## ARGUMENT

### PETITIONER'S PUMPING OF NONPOINT SOURCE GENERATED WATER FROM ONE SIDE TO THE OTHER SIDE OF A LEVEE THAT DIVIDES A NATURAL WATER BODY DOES NOT TRIGGER THE NEED FOR AN NPDES PERMIT UNDER THE CLEAN WATER ACT

#### A. The Eleventh Circuit's Decision Ignores Express Provisions of the Clean Water Act and Eschews the Principles of Federalism Embodied in the Clean Water Act by Stripping States of Their Land Use and Water Resources Planning Responsibilities

The Clean Water Act seeks to eliminate the discharge of pollutants into navigable waters. In designing the program to accomplish this goal, the Act recognizes two different sources of pollution, point sources and nonpoint sources.[4]

The issue raised by this case is how to treat the simple diversion of agricultural and other nonpoint source runoff from one side of a levee to the other through a pumping station. The Eleventh Circuit treated this diversion as entailing a point source that required an NPDES permit. However, that determination is contrary to express language in the CWA. The

[4] The Clean Water Act defines a point source as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Exempted are agricultural stormwater discharges and irrigated agricultural return flows. *Id.* Nonpoint sources are not defined by the Act, but are considered to be all other sources of pollution that are not regulated under the point source definition. A nonpoint source refers to "runoff caused primarily by rainfall [land use] activities that employ or cause pollutants." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). *See also* Esther Bartfeld, *Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 Envtl. L. 43, 45 n.6 (1993).



CWA plainly states that any "agricultural stormwater discharges or irrigated agricultural return flows" (agricultural runoff is partly involved here (Brief for Petitioner at 9-10)), are exempt from the NPDES permitting requirements. 33 U.S.C. § 1362(14).

The Act also directs that any other runoff from other nonagricultural land use activities is also not subject to NPDES point source permitting. Specifically, the CWA requires that any pollutants associated with water diversion facilities such as pumping stations are to be managed through the CWA's system for controlling nonpoint source rather than point source pollution. In 33 U.S.C. § 1314(f), Congress instructed the EPA administrator to provide guidelines and information to states for identifying

> (1) . . . the nature and extent of *nonpoint sources* of pollutants, and (2) processes . . . from
>
> . . . .
>
> (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Emphasis added.

Thus, water management and flow diversion facilities such as pumping stations that divert water affected by nonpoint source pollutants, should not to be treated like industrial or municipal polluters which must obtain NPDES permits requiring expensive technology to limit effluent outflows. Rather, pumping stations and like facilities should be subject only to state and locally controlled nonpoint source management methods of pollution control. *See* 33 U.S.C. §§ 1288, 1329, 1313(d).

This conclusion is supported by the overall structure and strategy employed by the CWA. "The Clean Water Act anticipates a partnership between the states and the federal government animated by a shared objective: to 'restore and maintain the chemical, physical, and biological integrity of the Nations's waters.' 33 U.S.C. § 1251(a)." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

Under the Act, a point source discharger of a pollutant into the nation's waters is generally required to obtain an NPDES permit in order to operate legally. 33 U.S.C. § 1311. This federally mandated permit was established principally for municipal and industrial wastewater outflows and was designed to get toxins out of the water. 33 U.S.C. § 1311(b), (c); *see Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 (1976). Many states including Florida administer the NPDES permitting program, but only with federal EPA oversight. Fla. Stat. § 403.0885 (2003).

The CWA addressed control of nonpoint source pollution in a completely different fashion because such pollution is not readily attributable to easily identifiable points of entry. Congress understood that nonpoint source pollution was the product of land uses and land use practices which could not be managed by federal fiat. After all, "direct federal regulation of local land use excites powerful opposition, partly because there is little tradition of doing so." John D. Leshy, *Natural Resources Policy in the Clinton Administration: A Mid-Course Evaluation from Inside*, 25 Envtl. L. 679, 682 (1995). Accordingly, Congress opted to embrace an approach in cooperative federalism giving *states* the authority and responsibility to manage nonpoint source pollution. States are to develop areawide waste treatment management plans, 33 U.S.C. § 1288, that direct adjustments in local land use practices and other local behaviors that cause nonpoint source pollution. Section 319 of the Act, 33 U.S.C. § 1329,



encourages states to identify best management practices to reduce pollutant loading and employ them in establishing their management programs for water bodies to achieve water quality standards developed by the states. 33 U.S.C. § 1329(a), (b). Section 319 also supports development of state management plans through a federal grant program to the states. 33 U.S.C. § 1329(h).

Nonpoint source pollution is also addressed in section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), under which *states* are authorized to

> 1) identify waters that are and will remain polluted [even] after the application of technology standards (i.e., the NPDES program), 2) prioritize the waters, taking into account the severity of their pollution, and 3) establish total maximum daily loads [TMDLs or amounts of pollutants] for the waters at levels necessary to meet applicable water quality standards.

Jim Vergura & Ron Jones, *The TMDL Program: Land Use and Other Implications*, 6 Drake J. Agric. L. 317, 320 (2001) (footnotes omitted). The state is then to incorporate its list of impaired water bodies and TMDLs into its continuing clean water planning process. 33 U.S.C. § 1313(d)(3), (e). Through this planning process, the states are given complete authority over how to direct their land and water resource activities to meet water quality goals. In this way, the states are still the masters of their local land and water use decisions, a principle to which the federal government has long deferred, *California v. United States*, 438 U.S. 645, 653 (1978), but the states are also partners with the federal government in a mutual effort to provide clean waters in our nation.

Flood control and water diversion activities are traditionally performed by the states for the purpose of facilitating appropriate land uses. But if EPA has the authority to control flood protection strategies, as well as other water

supply and management strategies (e.g., irrigation flow) through its NPDES permitting authority, the state will lose its traditional land use planning role. This was never contemplated by the CWA. In fact, just the opposite is evident as "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .' 33 U.S.C. § 1251(b)." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (*SWANCC*). *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 503 (1988) (Congress espoused even earlier in the Flood Control Act of 1944 a policy of "recogniz[ing] the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control.").

This Court has recognized that the Constitution established a federal government of enumerated powers which are few and defined in contrast to the powers of the states which are numerous and indefinite. *See United States v. Lopez*, 514 U.S. 549, 552 (1995). This limitation on federal authority was necessary, this Court has emphasized, to ensure our fundamental liberties and protect the nation against unfettered federal power and a "completely centralized government." *Id.* at 552-55. It follows that the EPA may not shift this balance of power by the simple expedient of asserting federal authority over local water diversion and flood control activities that Congress declined to provide.

The language and structure of the CWA demonstrate that Congress did not intend for EPA to control how states would manage the diversion of water for flood control and water supply purposes. The Eleventh Circuit's interpretation of the CWA that water diversion facilities like S-9 pumping stations do require federal, EPA-directed NPDES permits, results in that



very control which "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. The Eleventh Circuit's holding should be reversed.

### B. The South Florida Water Management District's Flood Protection System for Broward County Does Not *Add* a Pollutant to Navigable Waters But Instead Redirects Nonpoint Source, State Managed Runoff Throughout a Single Watershed

The Eleventh Circuit ruled that the District must adhere to federal permit mandates before it can legally protect Broward County from flooding caused by local land use activities by pumping water from one side of the levee to the other. However, the operation of such a water diversion/flood protection system does not "add" pollutants to the waters of the United States, which is the federal NPDES permit trigger.

Under the CWA, unless exempted, no one may discharge a pollutant from a point source into navigable waters without first obtaining a federal NPDES permit. 33 U.S.C. § 1311. The CWA specifically defines "discharge of a pollutant" as "any addition of any pollutant" to navigable water from any point source. The question for this Court to decide is whether pumping phosphorous enriched runoff from the east side of the L-33 and L-37 levees to the west side, both sides being integral parts of the same watershed and hydrological system,[5] constitutes the "addition" of a pollutant to the waters of the United States. The best interpretation of what Congress intended by the term "addition" would not lead to the federal government gaining indirect control over land use

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[5] "The Lake Okeechobee watershed [is] an immense, integrated and unique system of hydrologically connected lakes, rivers, bays and surface waters. . . . Fla. Stat. § 373.4595 (2003). Within this watershed lie populous municipalities, vast agricultural communities, and precious resources, including Florida's Everglades." Pet. at 8-9.

decisionmaking, yet the Eleventh Circuit's decision has done just that. This Court should be guided in its analysis by other federal Circuits holding that passing water through a dam-like facility such as levees, from one part of a water body to another part, does not *add* a pollutant to the water. It merely redistributes it within that water body.

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the court addressed whether "certain dam-induced water quality changes," *id.* at 161, constitute the "discharge of a pollutant." *Id.* Specifically, by damming streams, reservoirs are created upstream to prevent flooding and moderating water flow. Damming can have unintended negative effects like collecting pollutants such as sediment, dissolved minerals, and nutrients which, when released downstream through the piping system of a dam's structure, can change the quality of the water on the other side of the dam. Faced with the question of whether such an operational activity of dams involves "the discharge of any pollutant," 33 U.S.C. § 1311(a), because it causes the "*addition* of [a] pollutant to navigable waters," 33 U.S.C. § 1362(12) (emphasis added), the court accepted EPA's reasoning that "the . . . character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)." 693 F.2d at 175. Significantly, as with the instant case, the water on one side of the dam and that on the other side of the dam is all part of one contiguous, connected water body that is merely faced with a redistribution of the already existing pollutants.

In *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988), the court considered whether an NPDES permit was required for the operation of a hydroelectric facility that pumps water out of Lake Michigan uphill to a man-made reservoir from which the water is later released downhill through huge penstocks to turn electricity



generating turbines, only to be once again pumped back up the hill and into the Lake. In the process of pumping the lake water up to the reservoir, fish were pumped up also. When the water and fish were later dropped back through the penstocks and through the turbines, not only the water, but "entrained fish (live and dead fish, and fish remains)," *id.* at 581, were discharged back into Lake Michigan. Accepting the fact that the fish remains constituted a pollutant, the court was faced with the question of whether their discharge constituted the "addition of a pollutant" requiring an NPDES permit. The court followed the *Gorsuch* precedent finding that because "the fish, both dead and alive, always remain within the [contiguous] waters [above and below the penstocks, they] . . . cannot be added." *Id.* at 586. Thus, "those pollutants already in the water [not added by the dam's operation] moved and transformed by the essential operation of a hydroelectric power dam," *id.*, do not require an NPDES permit. The court found no "addition of a pollutant" where the activity involved the diversion of water between two contiguous water bodies that were originally one and where there was no introduction of a pollutant in the operation of the water diversion facilities. The same situation exists in the instant case.

In *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976), the court dealt with a challenge to regulations establishing limitations on the discharge of heat from steam driven electricity generating plants into navigable waters. Industry argued the effluent limitations in the regulations created absolute standards that applied regardless of the pollutants in a plant's intake water. *Id.* at 1377. The court agreed that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass," *id.*, and accordingly do not constitute a regulable "discharge of a pollutant." *Id.* Thus, the circuit court found that a pollutant not introduced by the operation of

the point source (e.g., dam, hydroelectric facility, water diversion pump and levee complex) did not constitute the discharge or addition of a pollutant subject to an NPDES permit. *See also Froebel v. Meyer*, 217 F.3d 928, 933 (7th Cir. 2000). *See contra Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001); *Dubois v. United States Department of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996); and *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305, 308 (9th Cir. 1993).

The analyses of the District of Columbia, Sixth, Fourth, and Seventh Circuits provide a superior framework and understanding of the critical public policy concerns necessary for deciding this case. Unlike the Eleventh Circuit decision in this case, these circuits' decisions correctly grasp why the diversion within a single watershed of water already tainted by pollutants, not generated by the operation of the water diversion facility but occurring naturally in the water or by virtue of authorized nonpoint source activities, does not constitute an *addition* of a pollutant when diverted into another part of the watershed. Such a conclusion makes perfect sense from the practical viewpoint that diversion facilities are just distributing water, *not adding* anything to it. The conclusion also makes sense because it advances Congress' desire to leave the cleanup of water pollution caused by agriculture and other nonpoint source land use activities to state discretion rather than federal fiat.



## CONCLUSION

The District's S-9 facility, permitted under Florida's federally approved Everglades Forever Act[6] as meeting state water quality standards, should not require an NPDES permit. S-9 does not "add" any pollutants to the waters, a prerequisite to an NPDES permit obligation. Rather it merely *diverts* runoff already enriched with phosphorous from agricultural and other nonpoint source, land use activities, through the L-33 and L-37 levees, from one part of the Lake Okeechobee watershed to another. This interpretation of what triggers the need for an NPDES permit should be embraced because it advances the CWA's own policy that the federal government is not to regulate agricultural and other nonpoint source, land use activities. Rather, an explicit objective of Congress in promulgating the CWA was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The Eleventh Circuit's decision shifts the balance of power over land use planning to the federal

---

[6] Florida's Legislature passed the Everglades Forever Act (EFA) of 1994 to reduce phosphorous levels in water diverted into the Everglades. Fla. Stat. § 373.4592 (2003). The EFA provides among other things a state water quality permitting program designed to improve the quality of runoff entering the Everglades.

authorities, defies Congress' express will, and raises substantial federalism issues.

The decision below should be reversed.

DATED: September, 2003.

Respectfully submitted,

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(18)

No. 02-626

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In The

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## BRIEF OF IDAHO GOVERNOR DIRK KEMPTHORNE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

This case raises important federalism issues. It presents the Court with an opportunity to preserve the ability of States to maintain their water quality responsibilities under the express design of the federal Clean Water Act and reaffirm their sovereign rights to manage water as they believe is appropriate. The decision below has far reaching impacts for water management throughout the country, particularly in Idaho and the West. As a matter of the fundamental construct between the state and federal government, the decision below must be reversed.

The question presented for review is:

Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| IDENTITY OF AMICUS CURIAE | 1 |
| INTEREST OF AMICUS CURIAE | 2 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 5 |
| I. INTRODUCTION: IDAHO'S ADMINISTRATION OF WATER QUALITY AND WATER MANAGEMENT | 5 |
| A. Idaho's Water Quality Enforcement Authority Under State Law | 6 |
| B. Idaho's Water Management Authority Under State Law | 8 |
| II. IDAHO'S SOVEREIGNTY OVER ITS WATER QUALITY AND WATER MANAGEMENT IS DEGRADED BY THE DECISION BELOW | 9 |
| CONCLUSION | 12 |


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## TABLE OF AUTHORITIES


| | Page |
|---|---|
| CASES | |
| *Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002) | 9 |
| *Shokal v. Dunn*, 707 P.2d 441 (Idaho 1985) | 11 |
| *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159 (2001) | 3, 12 |
| CONSTITUTIONS AND STATUTES | |
| IDAHO CONST. art. IV, § 5 | 1 |
| IDAHO CONST. art. XV, § 1 | 5 |
| IDAHO CONST. art. XV, § 3 | 5 |
| IDAHO CONST. art. XV, § 7 | 6 |
| 33 U.S.C. § 1251(b) (2003) | 3 |
| 33 U.S.C. § 1251(g) (2003) | 10 |
| 33 U.S.C. § 1342(b) (2003) | 10 |
| IDAHO CODE § 39-103(16) (Michie 2002) | 7 |
| IDAHO CODE § 39-105(e) (Michie 2002) | 6 |
| IDAHO CODE § 39-3601 (Michie 2002) | 2, 6, 7 |
| IDAHO CODE §§ 39-3601-39-3624 (Michie 2002 and Supp. 2003) | 6 |
| IDAHO CODE § 39-3602(28) (Michie 2002) | 7 |
| IDAHO CODE §§ 39-3601-3612 (Michie 2002 and Supp. 2003) | 7 |
| IDAHO CODE § 39-3611 (Michie 2003) | 7 |
| IDAHO CODE § 39-3611(1) (Michie 2003) | 7 |

TABLE OF AUTHORITIES – Continued

Page

IDAHO CODE § 39-3611(2) (Michie 2003) ..... 7

IDAHO CODE § 39-3611(5) (Michie 2003) ..... 7

IDAHO CODE § 39-3612 (Michie Supp. 2003) ..... 7

IDAHO CODE § 42-202B (Michie 2003) ..... 9

IDAHO CODE § 42-202B(3) (Michie 2003) ..... 8

IDAHO CODE § 42-222 (Michie 2003) ..... 8, 11

IDAHO CODE § 42-222(1) (Michie Supp. 2003) ..... 9

OTHER AUTHORITIES

H.B. 164, 56th Leg. 1st Sess., 2001 Idaho Sess. Laws 253 ..... 2

H.B. 284, 57th Leg. 1st Sess., 2003 Idaho Sess. Laws 806 ..... 8, 9

*Resolution of the Western States Water Council Regarding Water Transfers and National Pollutant Discharge Elimination System Discharge Permits* (August 1, 2003) ..... 2



## BRIEF OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Amicus Curiae Governor Dirk Kempthorne submits this brief in support of Petitioner South Florida Water Management District, having obtained the written consent of the Petitioner and Respondents. The letters of consent have been filed with the Clerk of this Court.[1]

## IDENTITY OF AMICUS CURIAE

Amicus Curiae is Idaho's chief executive with responsibility, through the State's executive branch agencies, over Idaho's water quality and water management.

Dirk Kempthorne is the duly elected Governor of the State of Idaho and a former United States Senator. As Idaho's Governor, he is required to see that the laws are "faithfully executed." IDAHO CONST. art. IV, § 5.

In 2001, Governor Kempthorne signed into law House Bill 164, legislation which was necessitated after Idaho's primary agency charged with protecting environmental quality was elevated to department status. The legislation furthered the laudable goal of advancing "the expressed intent of congress to control pollution" by defining the responsibilities of public agencies in "the control, and monitoring of water pollution, and through implementation of

[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case authored this brief in whole or in part and that furthermore, no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

this chapter, enhance the state's economic well-being." H.B. 164, 56th Leg. 1st Sess., 2001 Idaho Sess. Laws 253 (codified as amended as IDAHO CODE § 39-3601 (Michie 2002)).

The Idaho Department of Environmental Quality (IDEQ), a state department, is responsible for leading efforts to preserve the quality of Idaho's air, land and water for use and enjoyment today and in the future. The Director of IDEQ serves at the pleasure of Governor Kempthorne on a number of state commissions, including the Western States Water Council,[2] the Basin Environmental Improvement Project Commission, the Pesticide Management Commission, and the Idaho Rural Partnership. The Idaho Department of Water Resources (IDWR), another executive branch agency, is responsible for water administration in the State.

## INTEREST OF AMICUS CURIAE

Amicus is mindful of the sensitive setting of this particular application of the federal Clean Water Act. The

[2] The Western States Water Council recently resolved, *inter alia*:

> [T]hat the transport of water through ditches, canals, tunnels, pipelines and other constructed water conveyances in order to supply municipal, agricultural, industrial and other beneficial uses, as opposed to waste disposal purposes, in compliance with state law, should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents.

*Resolution of the Western States Water Council Regarding Water Transfers and National Pollutant Discharge Elimination System Discharge Permits* (August 1, 2003) (*See* App. at 1).



Florida Everglades is a natural resource treasure, not only to the State of Florida but also the United States. Just as Amicus is dedicated to preserving the great natural resources in the State of Idaho, so too does he strongly support all efforts to protect the environmental values of the Everglades.

However, section 101 of the Clean Water Act (CWA) declares that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities *and rights of states* to prevent, reduce, and eliminate pollution [and] to plan the development and use of land and water resources." 33 U.S.C. § 1251(b) (2003) (emphasis added). *See also Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps. of Eng'rs*, 531 U.S. 159, 175 (2001) (acknowledging "the States' traditional and primary power over land and water use.")

Governor Kempthorne and Idaho's executive branch agencies responsible for protecting water quality are also interested in maintaining the responsibility of the States – as recognized by Congress in the *clear text* of the Clean Water Act – to regulate water quality and management activity through the State-oriented statutory infrastructure Idaho has appropriately developed.

Amicus has responsibility for overseeing the State's regulatory infrastructure protecting water quality without weakening Idaho's ability to balance the essential components of water quality and water management. As a public official who resides in the West, he can offer the Court an informed case study on an application of the decision below which better illuminates an unwise intrusion of federal law into the affairs of the States.

The essential holding of the Eleventh Circuit below, that the CWA is expansive enough to require a National Pollutant Discharge Elimination System (NPDES) permit upon the mere movement of water between state transport systems, has undermined state authority in an area where cooperative federalism has proven to be an optimum method to protect the environment. Encroachment of federal power through interpretation of an act of Congress undermining settled expectations of the States must be accomplished, if necessary in the first instance, with exacting precision. In the present case, that has not occurred.

## SUMMARY OF ARGUMENT

The State of Idaho has an extensive and well-developed body of state law aimed squarely at protecting water quality. The Idaho Department of Environmental Quality is responsible for developing water quality standards under an infrastructure sanctioned by the Clean Water Act.

Similarly, the Idaho Department of Water Resources, through newly-amended legislation, considers water quality in its management of transfers of water between basins. Each of these schemes is protective of the environmental values embodied in a National Pollutant Discharge Elimination System (NPDES) permitting process.

The holding of the Eleventh Circuit will disrupt the careful balance between the appropriate role of the states and the federal government proscribed by Congress under the Clean Water Act. The Idaho Department of Environmental Quality and Department of Water Resources must



now administer the remainder of its water quality infrastructure mindful of the shift in authority back to a federal command-and-control structure. Such interference and disruption with appropriate State functions cannot be the state of the law under the Clean Water Act.

## ARGUMENT

### I. INTRODUCTION: IDAHO'S ADMINISTRATION OF WATER QUALITY AND WATER MANAGEMENT

In Idaho, the use and management of water is protected within the framework of the state constitution. For example, appropriated water in Idaho is declared subject to regulation by the state as a public use, IDAHO CONST. art. XV, § 1; the right to divert and appropriate unappropriated waters "shall never be denied," IDAHO CONST. art. XV, § 3; and the state water resource agency has its organic genesis in the state constitution. IDAHO CONST. art. XV, § 7.

The Idaho Departments of Environmental Quality and Water Resources jointly govern water quality and management through IDEQ's development and implementation of State water quality standards and Total Maximum Daily Load allowances (TMDLs) and IDWR's water transfer authority, each of which is further described below.

### A. Idaho's Water Quality Enforcement Authority Under State Law

Idaho's commitment to controlling water pollution is embodied in the following legislative prose from the State's water quality control statute:

> The legislature, recognizing that *surface water is one of the state's most valuable natural resources*, has approved the adoption of water quality standards and authorized the director of the department of environmental quality . . . to implement these standards. . . . [I]t is the purpose of this chapter to *enhance and preserve the quality and value of the surface water resources of the state of Idaho*. . . . In consequence of *the benefits to the public health, welfare, and economy*, it is hereby declared to be the policy of the state of Idaho to protect this natural resource by monitoring and controlling water pollution.

IDAHO CODE § 39-3601 (Michie 2002) (emphasis added).

The Idaho Legislature has provided to the Idaho Department of Environmental Quality broad authority to develop a system to safeguard the quality of the waters of the state, including authority to adopt and enforce rules relating to the discharge of effluent into the waters of the state, and to adopt and enforce state water quality standards that designate uses and provide criteria to protect those uses. *See generally* IDAHO CODE § 39-105(e) (Michie 2002); §§ 39-3601-39-3624 (Michie 2002 and Supp. 2003).

In providing this authority to the IDEQ, the state legislature very broadly defined "waters or water body" to mean "all accumulations of surface water, natural and artificial, public and private, or parts thereof which are wholly or partially within, flow through or border upon



this state." IDAHO CODE § 39-3602(28) (Michie 2002). *See also* IDAHO CODE § 39-103(16) (Michie 2002) (defining "water" almost identically).

While providing IDEQ authority to regulate water quality with respect to a very broad definition of waters of the state, the Idaho Legislature also intended "that the state of Idaho fully meet the goals and requirements of the federal clean water act and that rules promulgated under this chapter not impose requirements beyond those of the federal clean water act." IDAHO CODE § 39-3601 (Michie 2002).

As authorized by Congress through the Clean Water Act, Idaho has developed water quality standards and Total Maximum Daily Loads (TMDL). *See* IDAHO CODE §§ 39-3601-3612 (Michie 2002 and Supp. 2003).

Under state law, "*and as required by the federal Clean Water Act*," the Idaho Department of Environmental Quality is required to develop a total maximum daily load to control point source and non-point sources of pollution. IDAHO CODE § 39-3611 (Michie 2003) (emphasis added). Inherent within this authority is the power to identify pollutants impacting the water body; IDAHO CODE §39-3611(1) (Michie 2003); to inventory all point and non-point sources of the identified pollutant, IDAHO CODE § 39-3611(2) (Michie 2003); and to develop pollution control strategies for both point sources and non-point sources for reducing those sources of pollution, IDAHO CODE § 39-3611(5) (Michie 2003). After the TMDL process provided by state law is completed, the Director of IDEQ shall "integrate such processes into the state's water quality management plan developed pursuant to the federal clean water act." IDAHO CODE § 39-3612 (Michie Supp. 2003).

Accordingly, Idaho's authority to analyze, adopt, and implement water quality standards and TMDLs – activities which complement the goals of the federal Clean Water Act – are vigorously pursued within *the State's* statutory construct.

### B. Idaho's Water Management Authority Under State Law

Due to the scarcity of the resource, it is not uncommon in Idaho for water users to change certain attributes of their water uses. State law provides a transfer procedure to change one or more of the following elements: the point of diversion, the place of use, the period of use, and the nature of use. IDAHO CODE § 42-222 (Michie 2003).

During the 2003 legislative session, Idaho enacted House Bill 284, which was signed into law by Governor Kempthorne. H.B. 284, 57th Leg. 1st Sess., 2003 Idaho Sess. Laws 806. The legislation amended the definition of the "local public interest" criterion used to evaluate certain administrative decisions, including basin water transfers, within Idaho's statutory water management infrastructure. The "local public interest" is "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." IDAHO CODE § 42-202B(3) (Michie 2003).

House Bill 284 also added a new separate "economic effects" criterion intended to apply in the event of an out-of-basin transfer of water from one watershed or local area to another. Under Idaho law, such movement of water may not "adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is



outside of the watershed or local area where the source of water originates." IDAHO CODE § 42-202B (Michie 2003).

The Director of IDWR may consider trans-basin transfers if it will not adversely affect the local economy of the original source of the transfer, which is a new element enacted as a part of House Bill 284.[3]

## II. IDAHO'S SOVEREIGNTY OVER ITS WATER QUALITY AND WATER MANAGEMENT IS DEGRADED BY THE DECISION BELOW

The essential holding of the case at bar is that the CWA requires NPDES treatment for outside contributions to impacted point sources. "[B]ecause the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs." *Miccosukee Tribe of*

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[3] That part of the statute provides in pertinent part that:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and *is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use*, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

IDAHO CODE § 42-222(1) (Michie 2003) (emphasis added).

*Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1369 (11th Cir. 2002) (emphasis in original).

However Congress, through the Clean Water Act, spoke directly to the authority of States to continue responsibility over its water management.[4] Each of the previously described organic missions of IDEQ and IDWR under state law, specifically, protection of water quality through development of TMDLs and consideration of the public interest in water transfers, is severely undermined if the fundamental premise of such administration is now enveloped by an artificial emphasis on preventing the cause of pollution at its source through an NPDES context.

At present, Idaho does not maintain and administer an approved NPDES program under the Clean Water Act. *See* 33 U.S.C. § 1342(b) (2003) (providing for state program approval by the United States Environmental Protection Agency). But, as previously discussed, the State already aggressively protects water quality through its TMDL

[4] The Clean Water Act states clearly that:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g) (2003).



processing and "local public interest" review in administering water management.[5]

The dichotomy presented by the instant case is that the delicately calculated equipoise of state-federal cooperation under the Clean Water Act – as fully represented by the State of Idaho through its state programs protecting the same environmental values served by direct NPDES permitting – has been destabilized by the holding below.

For example, it is now possible that the simple act of requesting a transfer of a water right under Idaho Code section 42-222 will involve some level of consultation with the federal government as a process step in the State's undertaking to complete the transfer.

Similarly, it is now likely that the careful development of certain TMDLs aimed at improving water quality in impaired stream segments in Idaho – heretofore a perfectly

[5] The Idaho Supreme Court has spoken to the differing functions of IDEQ and IDWR and came to the conclusion that water quality cannot be undermined or degraded by the administration of separate statutory schemes:

> [We] add a word of caution regarding the differing functions of [IDWR] and the [IDEQ]. [IDWR] must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of [IDWR] to protect the health and welfare of Idaho's citizens and visitors – that role is vested in the [IDEQ]. . . . Nevertheless, although these agencies may have separate functions, [IDWR] is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the [IDEQ].

*Shokal v. Dunn*, 707 P.2d 441, 451-452 ( Idaho 1985).

lawful and appropriate State function focused on assessing the tolerable impact of human activities on the environment – could now be unduly marginalized in favor of direct action by the United States Environmental Protection Agency.

Without the Congress "expressing a desire to readjust the federal-state balance in this manner," *SWANCC*, 531 U.S. at 174, the Idaho Department of Environmental Quality and Idaho Department of Water Resources must now administer the remnants of its water quality infrastructure mindful of the shift of authority back to a federal command-and-control structure. Such interference and disruption with appropriate State water quality functions cannot be the state of the law under the Clean Water Act.

## CONCLUSION

For the reasons set forth above, the Court should reverse the decision below by the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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## APPENDIX

## RESOLUTION of the WESTERN STATES WATER COUNCIL regarding WATER TRANSFERS and NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM DISCHARGE PERMITS

**August 1, 2003**

**WHEREAS,** certain courts have ruled that the movement of water containing pollutants from one distinct body of navigable water to another can constitute a point source discharge subject to National Pollutant Discharge Elimination System (NPDES) permitting under the Clean Water Act; and

**WHEREAS,** in June 2003, the United States Supreme Court granted certiorari to review *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002); and

**WHEREAS,** there are numerous interstate, interbasin and intrabasin water transfers westwide that are essential to the social, economic and environmental well-being of the region; and

**WHEREAS** requiring NPDES permits for water right holders to transfer water to a location of need, in the exercise of their water rights, though no pollutant is added to the water and the transfer is not for waste disposal purposes, would inappropriately encumber necessary water transfers and the enjoyment of private property rights; and

**WHEREAS** the federal government has long recognized the right to use water as determined under the laws of the various states; and

**WHEREAS** Sections 101(g) and 510 of the Clean Water Act clearly leave water decisions to the states; and

**WHEREAS** Congress did not intend to regulate the mere movement of water from one basin or sub-basin to another in the legitimate exercise of water rights as point source discharges of pollutants.

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council declares that the transport of water through ditches, canals, tunnels, pipelines and other constructed water conveyances in order to supply municipal, agricultural, industrial and other beneficial uses, as opposed to waste disposal purposes, in compliance with state law, should not trigger federal NPDES permit requirements, simply because the transported water contains different chemical concentrations and physical constituents.

**BE IT FURTHER RESOLVED** that each Western State shall retain its discretion to use any available authorities to place appropriate conditions on transfers of water for water supply purposes so as to implement its water quality protection requirements.

(19)

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IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether the transfer of water containing preexisting pollutants is an addition of pollutants from a point source subject to the NPDES permit program of the Clean Water Act.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| INTEREST OF THE *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 6 |
| THE MERE TRANSFER OF WATER CONTAINING PRE-EXISTING POLLUTANTS IS NOT AN ADDITION OF POLLUTANTS FROM A POINT SOURCE UNDER THE CWA | 6 |
| A. The CWA Recognizes That Pollution Can Be Caused By Both Point And Nonpoint Sources And Provides For The Control Of Pollution Based On Its Source | 7 |
| B. Water Diversion Operations That Do Not Add A Pollutant To The The Water Being Pumped Are Not Subject To The NPDES Program | 11 |
| C. Reversal Of The Judgment Below Will Not Leave The Navigable Waters Unprotected From Pollution | 23 |
| CONCLUSION | 26 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) | 14, 19 |
| *Ardestani v. INS*, 502 U.S. 129 (1991) | 12 |
| *BankAmerica Corp. v. United States*, 462 U.S. 122 (1983) | 20 |
| *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F.Supp.2d 41 (N.D.N.Y 2003) | 6, 22 |
| *City of Trenton v. New Jersey*, 262 U.S. 182 (1923) | 1 |
| *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) | 20 |
| *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349 (1941) | 20 |
| *National Wildlife Fed. v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) | *passim* |
| *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) | *passim* |
| *United States v. James*, 478 U.S. 597 (1986) | 12 |

| Statutes & Regulations | |
|---|---|
| 40 C.F.R. Pts. 401-471 | 8 |
| Pt. 405 | 20 |
| Pt. 415 | 20 |
| 33 U.S.C. § 1251(a) | 7 |
| § 1251(a)(1) | 7 |
| § 1251(a)(7) | 7 |
| § 1251(g) | 22 |
| 33 U.S.C. § 1311 | 7 |
| § 1311(a) | 2, 7, 12, 14 |
| § 1311(b) | 2, 5, 20 |
| § 1311(b)(2)(E) | 2, 8 |
| § 1311(e) | 7 |




## TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 33 U.S.C. § 1313(d)(1)(A) | 23 |
| § 1313(d)(1)(C) | 23 |
| 33 U.S.C. § 1314(a)(2) | 23 |
| § 1314(f) | 9, 18 |
| § 1314(f)(1) | 15 |
| § 1314(f)(2)(F) | 2, 4, 9, 15 |
| 33 U.S.C. § 1316 | 5, 20 |
| § 1316(a)(1) | 8 |
| § 1316(b)(1)(A) | 8 |
| § 1316(b)(1)(B) | 8 |
| 33 U.S.C. § 1319(a)(1) | 22 |
| § 1319(c) | 6 |
| § 1319(c)(1) | 22 |
| § 1319(c)(2) | 22 |
| § 1319(d) | 6, 22 |
| 33 U.S.C. § 1329(a)(1)(A) | 2, 9, 23 |
| § 1329(a)(1)(B) | 2, 9-10, 23 |
| § 1329(b)(1) | 10, 23 |
| § 1329(b)(2) | 23 |
| § 1329(b)(2)(A) | 3, 10 |
| § 1329(b)(2)(B) | 3, 10, 23 |
| § 1329(b)(2)(C) | 10 |
| § 1329(b)(4) | 10 |
| 33 U.S.C. § 1342 | 7, 14 |
| § 1342(a) | 2 |
| 33 U.S.C. § 1362(6) | 12, 16 |
| § 1362(12) | *passim* |
| § 1362(14) | 11, 16 |
| § 1362(19) | 14 |

TABLE OF AUTHORITIES—Continued


| Other Authorities | Page |
|---|---|
| Environmental Law Institute, *Enforceable State Mechanisms For The Control of Nonpoint Source Water Pollution* (1997) | 15 |
| Letter from Alan G. Kirk, Acting Asst. Administrator for Enforcement & Gen. Counsel, U.S. EPA, to S. Leary Jones, Director, Division of Water Quality Control, Tennessee Dept. of Pub. Health (June 23, 1973) | 18 |
| South Florida Water Management District, *2003 Everglades Consolidated Report Executive Summary* | 24, 25 |
| South Florida Water Management District, *Facility and Infrastructure Location Index Map* (Version 5: 2002) | 16 |
| U.S. EPA, *The Control of Pollution From Hydrographic Modifications* (1973) | 18, 18-19, 19 |
| Office of Water, U.S. EPA, *The Quality of Our Nation's Water* (1992) | 15 |
| Office of Water, U.S. EPA, *U.S. EPA NPDES Permit Writer's Manual* (1996) | 21 |
| *Webster's Third New International Dictionary of the English Language Unabridged* (1986) | 3, 12, 13 |
| Office of Wetlands, Oceans, & Watersheds, U.S. EPA, *Nonpoint Source News-Notes* (May 2003) | 24 |


## INTEREST OF THE *AMICI CURIAE*

*Amici* are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments and are committed to fulfilling their obligations under federal and state law to protect water quality.

A "state undoubtedly has power, and it is its duty, to control and conserve the use of its water resources." *City of Trenton v. New Jersey*, 262 U.S. 182, 185 (1923). The control and diversion of water is a critical state function which serves the vital purposes of preventing flooding, providing a water supply, facilitating commerce, and improving recreational activities. The States have created numerous special government districts such as petitioner to carry out this function.

The court of appeals held that water diversion operations that merely transfer water containing pre-existing pollutants from one body of water to another are point source discharges subject to the Clean Water Act's NPDES permit program. The court's holding cannot be squared with the ordinary meaning of the CWA's text and disregards the policy reflected in the Act's structure. Moreover, it imposes a costly and impractical system of regulation on water management authorities.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

## SUMMARY OF ARGUMENT

1. The Clean Water Act (CWA) establishes two distinct approaches for controlling water pollution, one for point source discharges of pollutants and the other for nonpoint source discharges. Point source discharges, which are defined as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), are subject to the National Pollution Discharge Elimination System (NPDES) permit program. *See id.* §§ 1311(a); 1342(a). Under NPDES, point source discharges are subject to effluent limitations established by the EPA. *See id.* § 1311(b). Point sources must also ordinarily install "the best conventional pollutant control technology as determined" by the EPA. *Id.* § 1311(b)(2)(E).

Congress has chosen fundamentally different strategies for dealing with nonpoint source pollution. "State water quality standards are the basis of the 'nonpoint source' program." *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988). In CWA section 304, Congress directed EPA to identify and evaluate nonpoint sources of pollution including "processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters." 33 U.S.C. § 1314(f)(2)(F). Congress thus manifested its understanding that water management operations such as those at issue in this case involve nonpoint source rather than point source discharges.

Congress has also directed each State to identify and report to EPA "those navigable waters . . . which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain . . . applicable water quality standards." *Id.* § 1329(a)(1)(A). The State must also identify significant nonpoint sources of pollutants. *See id.* § 1329(a)(1)(B). Finally, each State must identify Best Management Practices (BMPs) that will reduce nonpoint source



discharges, *see id.* § 1329(b)(2)(A), as well as other programs such as enforcement, education, and technical assistance "to achieve implementation of the [BMPs]." *Id.* § 1329(b)(2)(B).

2. Disregarding both the statutory definition of the term "discharge of a pollutant" and the structure of the CWA, the court of appeals held that the Water District's use of the S-9 to transfer water which contains pre-existing pollutants from the C-11 Basin to WCA-3A is subject to the NPDES scheme. The court of appeals acknowledged that the S-9 "adds no pollutants to the water which it conveys." Pet. App. 3a. It nonetheless held that the S-9 is a point source discharger, reasoning that "[f]or pollutants to be *from* a point source, the point source does not necessarily have to be the source or origin of pollutants." *Id.* at 7a n.6. According to the court, "[f]rom a point source can also indicate the agent or instrumentality or the cause or reason by which the pollutants are added to navigable waters." *Id.* (internal quotations and citations omitted). This construction distorts the ordinary meaning of the statutory language, which defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

As commonly understood, the term "addition" means "the act or process of adding: the joining or uniting of one thing to another." *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1986). In this case, the pollutants are "join[ed]" or "unit[ed]" with "the navigable waters of the United States"—the term Congress chose to define the CWA's jurisdiction—when they first enter those waters as the result of nonpoint source discharges. The subsequent pumping of navigable waters which contain pre-existing pollutants to another portion of the navigable waters does not result in a "joining" of a pollutant with navigable waters.

Congress's use of the phrase "from a point source" reinforces this conclusion. "From" is most commonly "used as a function word to indicate a starting point" such as "a point or place where an actual physical movement . . . has its beginning." *Id.* at 913. The S-9 is not the "point or place where [the] actual physical" addition of a pollutant to the navigable waters "has its beginning." The court of appeals' construction thus denies the statutory language its ordinary meaning.

3. Rather than focus on the fundamental inquiry of whether the Water District was introducing pollutants into the navigable waters from the outside world, the court of appeals further held that "[w]hen a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water . . . that point source is the cause-in-fact of the discharge of pollutants." Pet. App. 7a-8a. The court's holding ignores that Congress expressly recognized that flow diversion activities do not involve point source discharges. *See* 33 U.S.C. § 1314(f)(2)(F).

The court's test is also flawed because it requires unfounded judicial inquiries into whether water bodies should be considered separate or the same and what the natural flow of water would be. Here, for example, the court acknowledged that water seeps through the levees from WCA-3A into the C-11 Canal. The court nonetheless declared WCA-3A and the C-11, which are part of an integrated flood control system, to be "two separate and distinct bodies of water." Pet. App. 8a n.8. This inquiry, however, has no basis in the statutory language which addresses the physical introduction of a pollutant from the outside world to the navigable waters as a whole.

4. The court of appeals' holding is also contrary to EPA's longstanding view that water management activities that merely alter the movement, flow or circulation of waters are



not subject to the NPDES program unless the activity physically introduces a pollutant into the navigable waters from the outside world. As recently as 1988, EPA took the position "that there can be no addition [of a pollutant] unless a source physically introduces a pollutant into water from the outside world." *Consumers Power*, 862 F.2d at 584 (other citation and internal quotations omitted). Moreover, for more than thirty years, EPA has had authority to promulgate national effluent standards for both existing and new categories and classes of point sources. *See* 33 U.S.C. § 1311(b); *id.* § 1316. While EPA has promulgated standards applicable to more than fifty different categories (and numerous subcategories) of point source dischargers, it has never promulgated effluent standards applicable to water diversion facilities.

5. Applying the NPDES program with its effluent limitations to water diversion operations would be impractical, if not wholly unworkable. One of the fundamental premises of the NPDES program is that an industrial facility's manufacturing processes will produce predictable types and levels of pollutants which can be treated in a cost-effective manner. Water diversion facilities, however, deal with a far more varied set of operating circumstances than do industrial facilities. Moreover, because water bodies collect pollutants added by nonpoint sources such as unchanneled urban runoff and agricultural runoff, water management agencies are confronted with a far greater number of potential pollutants than are industrial facilities. Indeed, the presence and concentration of particular pollutants are unpredictable as human conduct and weather conditions can be the cause of polluted runoff into a waterbody.

Because the types of pollutants found in such waters are numerous and highly variable, they are not susceptible to cost-effective regulation through effluent limitations. Moreover, water management agencies may lack legal authority to hold nonpoint source dischargers accountable for the pollu-

tion they cause. Most disturbingly, the holding below subjects the Water District and its employees to substantial civil and criminal penalties for engaging in essential diversion operations. *See* 33 U.S.C. § 1319(c) & (d); *see also Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 55 (N.D.N.Y. 2003) (assessing over $5.7 million in CWA penalties on municipal defendant). The judgment of the court of appeals should therefore be reversed.

## ARGUMENT

### THE MERE TRANSFER OF WATER CONTAINING PRE-EXISTING POLLUTANTS IS NOT AN ADDITION OF POLLUTANTS FROM A POINT SOURCE UNDER THE CWA

The text and structure of the Clean Water Act (CWA) manifest Congress's intent that water management operations that merely divert the flow of water without physically introducing any pollutant to it are not point source discharges subject to the National Pollutant Discharge Elimination System (NPDES) program. Indeed, for more than thirty years EPA has declined to regulate water management operations under the NPDES program. Moreover, there are substantial regulatory initiatives that address nonpoint source pollution both under the CWA and state environmental laws. In the case of the S-9 and the Everglades, the State of Florida and the South Florida Water Management District ("Water District") have undertaken extensive measures to abate pollution in the Everglades and have substantially reduced its phosphorus levels. The judgment of the court of appeals should therefore be reversed.



#### A. The CWA Recognizes That Pollution Can Be Caused By Both Point And Nonpoint Sources And Provides For The Control Of Pollution Based On Its Source

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress set "the national goal that the discharge of pollutants into the navigable waters be eliminated." *Id.* § 1251(a)(1). It further established "the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." *Id.* § 1251(a)(7). Consistent with these policies, the CWA establishes two distinct approaches for controlling water pollution, which depend upon whether a pollutant is discharged by a "point source" or a "nonpoint source." *See National Wildlife Fed. v. Gorsuch*, 693 F.2d 156, 165-66 (D.C. Cir. 1982).

1. *Point Source Pollution.* Point source discharges of pollutants are regulated by the National Pollutant Discharge Elimination System (NPDES) permit program. *See* 33 U.S.C. § 1342. "[T]he discharge of any pollutant by any person" from a point source is unlawful except when the discharge complies with other provisions of the CWA. *Id.* § 1311(a). The EPA or an authorized state agency may, however, "after . . . . public hearing, issue a permit for the discharge of any pollutant [from a point source] . . . upon condition that such discharge will meet" applicable requirements including the effluent limitations mandated by section 301, 42 U.S.C. § 1311. *Id.* § 1342. *See also id.* § 1311(e) ("Effluent limitations established pursuant to this section . . . shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter."). These effluent

limitations ordinarily "require [the] application of the best conventional pollutant control technology as determined" by the EPA. *Id.* § 1311(b)(2)(E).

The CWA directs EPA to "publish" within ninety days of the Act's enactment "and from time to time thereafter . . . revise . . . a list of categories" of point sources. *Id.* § 1316(b)(1)(A). The Act further grants EPA authority to promulgate "regulations establishing Federal standards of performance for new sources within [each] category" of point source. *Id.* § 1316(b)(1)(B).[2] The statute lists twenty-seven categories of point sources that EPA is required to regulate, but does not include water diversion facilities. *See id.* § 1316(b)(1)(A). Moreover, over the last thirty years EPA has promulgated extensive regulations applicable to more than fifty different categories of point sources. *See* 40 C.F.R. Pts. 401-471. Water management/diversion facilities, however, are not included in the EPA's point source regulations.

2. *Nonpoint Source Pollution.* Under the CWA, nonpoint source pollution "is defined by exclusion and includes all water quality problems not subject to" point source regulation. *Gorsuch*, 693 F.2d at 166. As the EPA explained in its *Gorsuch* brief, "nonpoint sources include, *inter alia*, unchanneled runoff from agricultural [and] silvicultural . . . activities." EPA Br. 8, *Gorsuch*, 693 F.2d 156 (internal quotations and citations omitted).

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[2] Section 306 defines "standard of performance" as:

> a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

33 U.S.C. § 1316(a)(1).



In contrast to the NPDES program, which reduces pollution by imposing effluent limitations on point sources, Congress has chosen fundamentally different strategies for dealing with nonpoint source pollution. "State water quality standards are the basis of the 'nonpoint source' program." *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988); *see also* EPA Br., *Gorsuch*, 7. Thus, in section 304—which bears the heading "Identification and evaluation of nonpoint sources of pollution"—Congress ordered the EPA to " issue to . . . the States, water pollution control agencies and agencies designated under section 1288 . . . guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants." 33 U.S.C. § 1314(f).

Most significantly, in this section, Congress expressly directed EPA to provide information to these agencies regarding the "processes, procedures, and methods to control pollution resulting from . . . *changes in the movement, flow, or circulation of any navigable waters or ground waters*, including changes caused by the construction of dams, levees, channels, causeways, or *flow control diversion facilities*." *Id.* § 1314(f)(2)(F) (emphasis added). Congress thus manifested its understanding that water management operations such as those at issue in this case involve nonpoint source rather than point source discharges.

Congress subsequently amended the CWA to require each State to "prepare and submit" for EPA approval "a report which . . . identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards. " *Id.* § 1329(a)(1)(A). The report must also "identif[y] those categories and subcategories of nonpoint sources or, where appropriate, partic-

ular nonpoint sources which add significant pollution to each portion of the navigable waters identified." *Id.* § 1329(a)(1)(B).

Most significantly, Congress directed that each State "prepare and submit" for EPA approval a "management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters." *Id.* § 1329(b)(1). Among other things, Congress mandated that each State's program contain "[a]n identification of the best management practices [BMPs] and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated" in the State's report. *Id.* § 1329(b)(2)(A). Moreover, the State must identify programs such as "enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects . . . to achieve implementation of the [BMPs]," *id.* § 1329(b)(2)(B), and include "a schedule [of] annual milestones" to measure the State's success in implementing both the programs and the BMPs. *Id.* § 1329(b)(2)(C). Each State is further directed to "develop and implement" its nonpoint source management program "on a watershed-by-watershed basis." *Id.* § 1329(b)(4).

As the forgoing demonstrates, Congress sanctioned a far different approach for controlling nonpoint source pollution than the NPDES program with its effluent-based discharge limitations. As explained below, petitioner's operation of the S-9 does not constitute a point source discharge of pollutants under either the plain meaning of the relevant statutory provisions or EPA's longstanding construction of them.



### B. Water Diversion Operations That Do Not Add A Pollutant To The Water Being Pumped Are Not Subject To The NPDES Program

It is undisputed that the C-11 Canal "collects water run-off from the [western Broward County] basin and seepage through the levees from WCA-3A." Pet. App. 3a. This runoff "contains higher levels of phosphorus than that naturally occurring in WCA-3A." *Id.* While the S-9 falls within the definition of a "point source," *see* 33 U.S.C. § 1362(14), it is also undisputed that the S-9 "adds no pollutants to the water which it conveys." Pet. App. 3a.

The court of appeals nonetheless held that use of the S-9 for water diversion operations rendered it a point source discharger of pollutants subject to the NPDES program. *See id.* at 6a-9a. The court reasoned that:

> When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs.

*Id.* at 7a-8a.

The court further explained that "[f]or pollutants to be *from* a point source, the point source does not necessarily have to be the source or origin of pollutants." *Id.* at 7a n.6. According to the court, the statutory language "'[f]rom a point source' can also indicate the 'agent or instrumentality' or the 'cause or reason' by which the pollutants are added to navigable waters. We conclude that this interpretation of 'from' is most apt: from=by." *Id.* (quoting *The Random House Dictionary of the English Language* 770 (2d ed. 1987)).

The court's construction of the operative statutory language distorts the ordinary meaning of its terms, which focus on the introduction of the pollutant into the navigable waters from the outside world. It ignores Congress's carefully crafted scheme for regulating water pollution based on its source as well as thirty years of administrative practice under the CWA. Most troubling, it subjects water management agencies to liability including substantial fines and penalties, the cost of installing expensive control technology for pollution they did not cause, and the burden of obtaining an NPDES permit even though in many cases the large variety of pollutants that enters their waters renders the installation of effluent control technology impractical. It would thus lead to numerous absurd results.

1. As in every case of statutory construction, "'[t]he starting point . . . is the language of the statute itself.'" *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (quoting *United States v. James*, 478 U.S. 597, 604 (1986)) (other citation and internal quotations omitted). When individual words may have multiple definitions, the Court's task is to look at the operative language in "context" and give the statute its "most natural reading." *Id.* at 135.

As explained above, section 301(a) renders "the discharge of any pollutant by any person . . . unlawful" except when conducted in compliance with other enumerated provisions of the CWA. 42 U.S.C. § 1311(a). As relevant here, the CWA defines the term "discharge of a pollutant" to "mean[] . . . any *addition* of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (emphasis added). It also defines the term "pollutant" to mean a variety of substances "discharged into water." *Id.* § 1362(6).

As commonly understood, the term "addition" means "the act or process of adding: the joining or uniting of one thing to another." *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1986). In this case,



the pollutants are "join[ed]" or "unit[ed]" with "the navigable waters" of the United States—the term Congress chose to define the jurisdiction of the act—when they first enter those waters as the result of nonpoint source discharges. *See* Pet. App. 3a; *see also* 33 U.S.C. § 1362(12). The subsequent pumping of navigable waters which contain pre-existing pollutants to another portion of the navigable waters does not result in a "joining" of a pollutant with navigable waters. The pollutant has already been added to the navigable waters from the outside world.[3]

Contrary to the view of the court of appeals, Congress's use of the phrase "from a point source" reinforces this conclusion. While the word "from" has several meanings, it is most commonly "used as a function word to indicate a starting point" such as "a point or place where an actual physical movement . . . has its beginning" or as "the starting or focal point of any activity or movement." *Webster's Third New International Dictionary*, at 913. It is also commonly "used as a function word to indicate the source or original or moving force of something" such as "the source, cause, means, or ultimate agent of an action or condition" or "the place of origin, source, or derivation of a material . . . thing." *Id.*

Here, the point source (S-9) is not the "point or place where [the] actual physical" addition of pollutant to the navigable waters "has its beginning." The S-9 is not "the place of origin," the "cause" or the "source" of the addition of pollutants to the navigable waters. Rather, it is simply a conduit within the navigable waters. The court of appeals'

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[3] In defining the reach of the discharge prohibition, Congress did not use the phrase "to a body of the navigable waters" but rather the general phrase "to navigable waters." 33 U.S.C. § 1362(12). The use of this terminology reinforces the conclusion that the statute is directed at the physical introduction of a pollutant into the navigable waters from the outside world rather than transfers of water within the navigable waters.

simplistic redefinition of the term ("from=by") and its conclusion that "[f]or pollutants to be *from* a point source, the point source does not necessarily have to be the source or origin of pollutants," Pet. App. 7a n.6, denies the statutory language its ordinary meaning. As the D.C. Circuit has explained:

> [I]t does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

*Gorsuch*, 693 F.2d at 176. *See also Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) ("[T]he Act prohibits only the addition of any pollutant to navigable waters from a point source. Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass.").

Other provisions of the statute support the common-sense reading that the CWA's prohibitions on point source discharges are directed at the initial introduction of a pollutant into the navigable waters from the outside world. Congress defined "pollutant" as meaning various substances "discharged into water." 33 U.S.C. § 1362(6). Congress defined "pollution" as meaning "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 1362(19). Once a pollutant is discharged into the navigable waters, it joins with the water to become pollution. The relevant language of the CWA does not, however, prohibit the discharge of "pollution," but rather, the discharge of a "pollutant." *Id.* § 1311(a).

2. Rather than focus on the fundamental inquiry of whether the Water District was introducing pollutants into the navigable waters from the outside world, the court of appeals



created an inherently flawed test. The court adopted a broad rule of "but for" causation that, if affirmed, will erroneously subject a wide range of water management activities to the NPDES program. *See* Pet. App. 7a ("an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters").

The court then reasoned that "[w]hen a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." *Id.* at 7a-8a. Beyond the fact that the court's application of its test demonstrates that it is inherently manipulable, Congress itself expressly recognized that flow diversion activities do not involve point source discharges. *See* 33 U.S.C. § 1314(f)(1) & (2)(F) (directing EPA to issue guidelines concerning nonpoint sources of pollutants and to provide information on "processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities").

"After 25 years of federal and state efforts under the federal Clean Water Act, nonpoint source pollution remains a significant problem." Environmental Law Institute, *Enforceable State Mechanisms For The Control of Nonpoint Source Water Pollution* 1 (1997). Indeed, "nonpoint sources of pollution are more widespread [than point sources] and introduce vast quantities of pollutants into our surface and ground waters." Office of Water, U.S. EPA, *The Quality of Our Nation's Water* 9 (1992). Most water bodies in the country likely collect some nonpoint source pollutants in the form of runoff or atmospheric deposition; they may also contain some pollutants from natural sources. *See id.*

Moreover, any body of water that is used either for maritime commerce or recreational boating is likely to contain pollutants such as spilled fuel and cargo, as well as trash that has been thrown overboard. *See* 33 U.S.C. § 1362(6) (defining "pollutant" as including "garbage").

Under the court of appeals' test, canal systems that connect one body of water to another for a variety of purposes including facilitating commerce would be deemed point source dischargers. Routine canal operations of pumping water into and draining water from a lock would thus require an NPDES permit whenever canal waters flow into another body of water or vice versa.[4] Under the court's reasoning, such operations would result in an addition of pollutants to a receiving body of the navigable waters and the lock operations would be "the cause-in-fact of the release of pollutants into navigable waters." Pet. App. 7a.

Indeed, under the court of appeals' rationale, even if the Water District did not pump water from the C-11 Canal, the Canal itself might require an NPDES permit. The C-11 Canal drains in an easterly direction into other bodies of water such as the South New River Canal and the Dania Cut-Off Canal, the Intracoastal Waterway, and the Atlantic Ocean. *See* South Florida Water Management District, *Facility and Infrastructure Location Index Map* (Version 5: 2002). According to the court of appeals, before the construction of the C-11 Canal, "the natural flow of the waters [in the C-11 basin] . . . was a southerly moving sheet of water." Pet. App. 8a n.8. The Canal, in the court of appeals' formulation, thus

[4] The term "point source" is broadly defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, [or] *channel* . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). A canal is thus a point source. Given the wide range of substances that are pollutants under the CWA, every waterbody is likely to contain some pollutant even if the water body is not deemed to be impaired.



"changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed." *Id.* at 7a. The Canal is therefore. under the court's logic, "the cause-in-fact of the discharge of pollutants." *Id.*

The court of appeals' test is manifestly flawed in that it requires artificial judicial inquiries into whether water bodies should be considered separate or the same and what the natural flow of water would be. Here, for example, the court below first acknowledged but then disregarded the historic intermingling of the waters from the C-11 Basin and the WCA-3a. *Compare id.* at 3a *with id.* at 8a n.8. According to the court, "[s]ince the completion of the L-33 and L-37 levees, water does not flow from the C-11 Canal into WCA-3A. Man has made the two bodies of water two separate and distinct bodies of water." *Id.* The court's reasoning begs the question of whether the Canal and the WCA-3A would be considered the same or different bodies of water if the levee separating them was breached either by human intervention or a hurricane.

The court of appeals' acknowledgment that there is "seepage through the levees from WCA-3A" into the C-11, *id.* at 3a, underscores the internal inconsistencies of its reasoning. Notwithstanding that the S-9 simply pumps back some of the water from whence it came, and that the C-11 Canal and WCA-3A were created, with Congressional authorization, to be part of an integrated flood control system, *see* Pet. 9, the court declared them to be "two separate and distinct bodies of water." Pet. App. 8a n.8. This inquiry simply has no basis in the statutory language, which regulates the "addition of any pollutant to navigable waters" as a whole and not diversion activities within the navigable waters. 33 U.S.C. § 1362(12).

3. The court of appeals' holding is also contrary to EPA's longstanding view that water management activities that

merely alter the movement, flow or circulation of waters are not subject to the NPDES program unless the activities physically introduce a pollutant into the navigable waters from the outside world. *See generally* EPA Br., *Gorsuch*, 16-40; *Gorsuch*, 693 F.2d at 174-75. Again in 1987, EPA took the position "that there can be no addition [of a pollutant from a point source] unless a source physically introduces a pollutant into water from the outside world." *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (citations and internal quotations omitted).

Beginning in 1973, Alan G. Kirk, then EPA's Acting Assistant Administrator for Enforcement and General Counsel concluded that discharges from dams were not subject to the NPDES program notwithstanding that dams may cause substantial water quality problems such as the "depletion of dissolved oxygen, reduction of streamflow and consequent increases in pollutant concentrations below the dam." Letter from Alan G. Kirk to S. Leary Jones, Director, Division of Water Quality Control, Tennessee Dept. of Pub. Health at 1 (June 23, 1973) (quoted in EPA Br., *Gorsuch*, 35). EPA did so on the ground that these "water quality effects [do] not result[] from the discharge of pollutants attributable to the dam itself." *Id.* Instead, pollution caused by such discharges is controlled by nonpoint source programs.[5]

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[5] Pursuant to Congress's mandate to study the causes and control of nonpoint source pollution, *see* 33 U.S.C. § 1314(f), in 1973 EPA issued the first of several reports on the water pollution effects caused by hydrographic modifications. *See generally* U.S. EPA, *The Control Of Pollution From Hydrographic Modifications* (1973). The report specifically observed that "[t]he increased uses of land adjacent to streams following the provision of flood protection and drained arable land provide sources of pollution which directly drain into the water course. Many of the pollutants arise as the normal product of urbanization or farming practices." *Id.* at 25. The report further noted that "[f]ollowing channelization and drainage projects . . . natural places of detention [of pollutants such as phosphorus] are by-passed or removed which has the effect



EPA took this position in the *Gorsuch* litigation. In that case, EPA expressly recognized that it "is now settled that EPA cannot require the reduction or treatment of pollutants 'other than those *added*' by the discharger at the point source." EPA Br., *Gorsuch*, 23 (quoting *Appalachian Power Co. v. Train*, 545 F.2d at 1377). EPA further noted that "[g]iven EPA's lack of authority under the NPDES program to control pollutants occurring naturally in the waterway *or previously added by other sources*, EPA cannot legally control . . . dam-induced water quality changes" created by the alteration of water flows. *Id.* at 23-24 (emphasis added). *See also Gorsuch*, 693 F.2d at 169 & n.40 (noting that in 1974 and 1978, EPA "considered at length whether to require NPDES permits for dams and adhered to its original position both times"). *See also NWF v. Consumers Power Co.*, 862 F.2d at 583 ("To discharge a pollutant under the CWA, EPA argues as it had in *Gorsuch* . . . that a facility must 'add' pollutants to navigable waters of the United States.") (quoting *Gorsuch*, 693 F.2d at 174-75); *see also id.* at 584 (noting EPA's argument "that there can be no addition unless a source 'physically introduces a pollutant into water from the outside world'") (quoting *Gorsuch*, 693 F.2d at 175). In both these cases, the courts upheld the EPA's position. Most significantly, Congress did not overturn the decisions.

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of increasing pollutant concentrations in the flowing waters. The effects of these pollutants are then transferred downstream decreasing water quality while in passage." *Id.* at 26.

As this indicates, both Congress and EPA have been long aware of the effects of nonpoint source pollution (including concentrations of chemical wastes) on waters under the control of water management agencies. *See id.* at 79 ("If lower quality water is discharged than previously existed before the reservoir then the effect is the same as that caused by a pollution source."). Yet neither Congress nor EPA has ever required water management authorities to obtain NPDES permits simply to move water from one waterbody to another.

Moreover, for more than thirty years EPA has had authority to promulgate by regulation national effluent standards for both existing and new categories and classes of point sources.. *See* 33 U.S.C. §§ 1311(b), 1316; *see also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 127-36 (1977). EPA has promulgated standards applicable to more than fifty different categories (and numerous subcategories within these categories) of point source dischargers.[6] EPA, however, has never promulgated effluent standards applicable to water diversion facilities. This is consistent with EPA's longstanding view that water diversion activities that do not physically introduce a pollutant into the navigable waters are subject to regulation under nonpoint source programs. *See* discussion *supra* at 17-19. *See also BankAmerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("'[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'") (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)).

4. Applying the NPDES program with its effluent limitations to water diversion operations would be impractical and inequitable to water management agencies. One of the fundamental premises of the NPDES program is that an industrial facility's manufacturing processes will produce predictable types and levels of pollutants which can be treated in a cost-effective manner. *See Gorsuch*, 693 F.2d at 178 & n.65 ("The Act contains numerous requirements that cost be taken into account in establishing effluent limits . . . ."). Applicants for an NPDES permit are thus required to submit

[6] For example, there are 12 subcategories of effluent standards applicable to processors of dairy products, *see* 40 C.F.R. Pt. 405, and 47 subcategories of current standards applicable to manufacturers of inorganic chemicals. *See id.* Pt. 415.



to the permitting authority information such as "[i]ntake and effluent characteristics," "[p]ollutants expected to be present," "[t]reatment technologies," and "[p]roduction information." Office of Water, U.S. EPA, *U.S. EPA NPDES Permit Writer's Manual* 33 (1996).

EPA's regulations contain Effluent Limitation Guidelines, most of which "are expressed in terms of allowable pollutant discharge per unit of production . . . or are based on wastewater flow" and which must be converted into specific permit limits. *Id.* at 63. "To determine permit limits . . . these standards are multiplied by a reasonable measure of the facility's actual production/flow rate." *Id.* While recognizing that a facility's production and wastewater flow rates "will vary," *id.*, permit writers are instructed that "[t]he objective in determining a production or flow estimate for a facility is to develop a single estimate of the long-term average production rate . . . which can reasonably be expected to prevail during the next term of the permit." *Id.* at 64. Permit writers are also required to "consider *all* applicable standards and requirements for *all* pollutants discharged" when developing effluent limitations for industrial point sources. *Id.* at 50.

Applying this system of regulation to water diversion facilities would be impractical, if not wholly unworkable. The water diverted by such facilities will frequently contain large amounts of pollutants added by nonpoint sources such as runoff and atmospheric deposition. The presence and concentration of particular pollutants are unpredictable as human conduct (such as oil/chemical spills) and weather conditions (such as rainfall levels and storms) can be the cause of pollutants entering into a waterbody. Moreover, the types of pollutants found in such waters are numerous and highly variable and are thus not susceptible to cost-effective regulation through effluent limitations.

Water diversion facilities thus deal with a far more varied set of operating circumstances and a far greater number of

potential pollutants than do industrial facilities. Moreover, water management agencies may lack legal authority to hold nonpoint source dischargers accountable for the pollution they cause. Besides imposing on water districts the expense of installing costly effluent control technology for pollutants they did not introduce into the navigable waters, the holding below subjects the districts to a permit system which cannot possibly account for all the different pollutants that may be found in their waters.

The latter is particularly disturbing because the violation of "any permit condition or limitation" is a violation of federal law, 33 U.S.C. § 1319(a)(1), which subjects the Water District and its employees to substantial civil and criminal penalties solely for engaging in essential diversion operations. *See id.* § 1319(c)(1) (criminal "fine of not less than $2,500 nor more than $25,000 per day of violation" for negligent violations); *id.* § 1319(c)(2) (criminal "fine of not less than $5,000 nor more than $50,000 per day of violation" for knowing violations); *id.* § 1319(d) ("civil penalty not to exceed $25,000 per day for each violation"). *See also Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp.2d 41, 55 (N.D.N.Y. 2003) (assessing over $5.7 million in penalties on municipal defendant for CWA violations).

The court of appeals' reading of the statute ignores that "the [CWA] shows not only Congress' determined effort to clean up our polluted lakes and rivers, but also its practical recognition of the economic, technological, and political limits on total elimination of all pollution from all sources." *Gorsuch*, 693 F.2d at 178. And it also excises from the statute Congress's "specific indication . . . that [it] did not want to interfere any more than necessary with state water management." *Id.* (citing 33 U.S.C. § 1251(g)) ("the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this [Act]").



### C. Reversal Of The Judgment Below Will Not Leave The Navigable Waters Unprotected From Pollution

A ruling by this Court that the Water District's use of S-9 for flood control operations does not require an NPDES permit will not leave the navigable waters unprotected from polluters. Of course, the NPDES program applies to any point source that discharges pollutants to the navigable waters including any point source that discharges into the C-11 Basin. Moreover, for those waters where the effluent limitations established under the NPDES program "are not stringent enough to implement [a State's] water quality standard applicable to those waters," a State is required to establish "the total maximum daily load" of those pollutants determined by the EPA to be necessary to achieve water quality standards. 33 U.S.C. § 1313(d)(1)(A) & (C); *see also id.* § 1314(a)(2).

Furthermore, as explained above, *see* discussion *supra* at 9-10, the CWA requires States to identify waterways which do not meet water quality standards because of nonpoint source pollution. *See* 33 U.S.C. § 1329(a)(1)(A). States are also required to identify "categories and subcategories of nonpoint sources" and "where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified." *Id.* § 1329(a)(1)(B). Most importantly, States are required to develop comprehensive programs for controlling nonpoint source pollution, which must identify best management practices [BMPs] for controlling nonpoint source pollution and which must include a "schedule [of] annual milestones" to measure the success of implementation efforts. *Id.* § 1329(b)(1) & (2). A State's program must also identify programs such as "enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects . . . to achieve implementation of the" BMPs. *Id.* § 1329(b)(2)(B).

In the Everglades, the Florida Department of Environmental Protection and the University of Florida Institute of Food and Agricultural Services conduct a joint project to develop BMPs "to reduce nutrient loading (particularly from phosphorus) from farms in the Everglades Agricultural Area (EAA)." Office of Wetlands, Oceans, and Watersheds, U.S. EPA, *Nonpoint Source News-Notes* 12 (May 2003). As EPA explains, "[u]nder law, every grower in the EAA is obligated to implement a certain number of BMPs, the amount and kind of BMPs depending on the specific circumstances of the farm location, configuration, and cropping practices." *Id.* Beyond developing the original BMPs, "[t]he project continues to assist growers in BMP implementation to keep pace with their changing farm configurations and to develop additional BMPs as conditions change." *Id.* at 13.

Since implementation of the project BMPs, the reduction of phosphorus loads "has averaged more than 50 percent, and in some years has exceeded 70 percent" from the historic baseline. *Id.* These reductions substantially exceed the 1994 Everglades Forever Act's goal of a 25 percent reduction. *Id.* The project continues to examine ways to optimize the reduction of phosphorus loads caused by agricultural activities in the Everglades. *See id.* at 12-13.

Moreover, in the Everglades Forever Act, the State of Florida directed the Water District to construct more than 41,000 acres of wetlands to serve as Stormwater Treatment Areas (STAs). *See* South Florida Water Management District, *2003 Everglades Consolidated Report Executive Summary* 12; *see also* U.S. Br. *Am. Cur.* On Pet. 4-5 (discussing federal Everglades environmental protection legislation). The "STAs function by accumulating phosphorus in their sediments through biological and chemical wetland processes" and thus reduce the flow of phosphorus into the Everglades Protection Area. *2003 Everglades Consolidated Report*, at 72. In Water Year 2002 (May 1, 2001—April 30, 2002), the STAs "retained an average of 71 percent of inflowing phosphorus and decreased concentrations to an average below 40 ppb, well below the long-term design target of 50 ppb." *Id.* at 13. Because the Everglades Forever Act requires the "[o]ptimization of the nutrient removal performance of the" STAs, the Water District is engaged in additional research to increase their performance. *Id.* at 14. The District is also conducting extensive research into the effectiveness of advanced biological and chemical treatment technologies in removing phosphorus.[7] *See id.* at 15-17.



In sum, the NPDES program is not—and was not intended by Congress to be—the only mechanism available for reducing pollution in the navigable waters. Rather, Congress recognized that the causes of water pollution are complex and that control programs should be based on the source of pollutants. Congress also recognized "the economic, technological, and political limits on total elimination of all pollution from all sources." *Gorsuch*, 693 F.2d at 178. The court of appeals not only distorted the ordinary meaning of the CWA's language, it disregarded the policy reflected in the structure of the Act.

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[7]Respondents seek to require the Water District to obtain an NPDES permit to operate S-9 primarily because it pumps "water contain[ing] higher levels of phosphorus than that naturally occurring in WCA-3A." Pet. App. 3a. While some field studies of advanced treatment technologies have shown the potential to reduce phosphorus outflow levels to near or slightly above the 10 parts per billion level, whether they can be successfully implemented on a large scale is still unclear. Moreover, while some technologies may greatly reduce phosphorus levels, they may also cause increased concentrations of other pollutants, such as aluminum and chloride. *See 2003 Everglades Consolidated Report*, at 16.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* THE CITY OF WESTON, FLORIDA, IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the transfer of untreated water from one natural source to another requires a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. § 1342.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| INTEREST OF *AMICUS CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 3 |
| FACTUAL BACKGROUND | 4 |
| ARGUMENT | 5 |
| I. ENJOINING THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT FROM OPERATING THE S-9 PUMP STATION WOULD NOT BE IN THE PUBLIC INTEREST BECAUSE OF THE RESULTING HAZARDS TO THE CITY AND ITS SIXTY THOUSAND RESIDENTS | 5 |
| II. A NPDES PERMIT IS NOT NECESSARY, BECAUSE OTHER FEDERAL, STATE, REGIONAL AND COUNTY REQUIREMENTS ADEQUATELY PROTECT WATER QUALITY IN THE C-11 WEST BASIN, AS SHOWN BY THE CITY'S EXAMPLE | 8 |
| CONCLUSION | 14 |


BEST AVAILABLE COPY



TABLE OF AUTHORITIES


Page

CASES

*Miccosukee Tribe of Indians, et al. v. South Florida Water Management Dist.*, 280 F.3d 1364 (11th Cir. 2002) ..... *passim*

STATUTES AND REGULATIONS

Everglades Forever Act of 1994, Section 373.4592, Fla. Stat. (2003) ..... 12

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Ted R. Brown, *Regulating Wetlands: The Florida Approach*, SG096 ALI-ABA 99 (2002) ..... 5

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TABLE OF AUTHORITIES – Continued

Page

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City of Weston Existing Land Use Map (April 19, 1999), available at http://www.westonfl.org/commission_departments/existing.html (last visited on September 9, 2003) .....10, 11

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Page

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Summary of C-11 West Basin Program, at http://www.sfwmd.gov/org/reg/esp/c11w.html (last visited on September 9, 2003) .....11

## INTEREST OF *AMICUS CURIAE*

*Amicus curiae*, the City of Weston (hereinafter referred to as the "City") submits this brief in support of petitioner South Florida Water Management District (hereinafter referred to as the "District") seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1]

The City has a compelling interest in seeing that the question presented in this case is answered in the negative, and the Eleventh Circuit Court of Appeals' decision reversed. That interest is as a permit holder discharging to the District's water management system and as a taxpayer, along with all City property owners, with ultimate responsibility to fund the District's activities. The NPDES program is the wrong program to address water quality issues associated with the transfer of water.

The City offers its own experience, as an example of the multiple ways in which municipal stormwater is already heavily regulated. Efforts to protect and improve water quality within the City pursuant to these programs include:

---

[1] Pursuant to Rule 37.4, the law firm of counsel for the City serves as the authorized law officer of the City, so no motion is required. Pursuant to Rule 37.6, *amicus* City represents that counsel for the City authored this brief in its entirety and that no person or entity other than the City and its representatives made any monetary contribution to the preparation or submission of this brief.

(a) the creation of one of the largest and most successful wetland mitigation projects in the country by the City with no federal or state funding, and its continued management and maintenance by the City;

(b) the City's voluntary participation in a District program to institute Best Management Practices in the management of City property and monitor water quality indicators; and

(c) the District's plans to develop, by the end of 2006, a massive Stormwater Treatment Area in the City through which all water in the C-11 Canal will be diverted prior to reaching the S-9 pump station.

*Together, these activities are projected to reduce the phosphorus load in the City's stormwater runoff by at least 85%.* Requiring the District to meet the requirements of the NPDES program now, prior to the full implementation and benefit of these activities, would require wasteful and duplicative investments in short term treatment solutions.

The City is located in the C-11 West Basin, Broward County, Florida, bordering the western edge of the developed area protected from catastrophic flooding by the District's levee system. The majority of the City's stormwater runoff ultimately flows into the C-11 Canal. The S-9 pump station, which is the object of respondents' attack, controls the water levels in the C-11 Canal and, when necessary, transfers water from the canal into Water Conservation Area 3A. *Miccosukee*, 280 F.3d at 1366. As noted by the Eleventh Circuit, "Without the operation of the S-9 pump station, the populated western portion of Broward County would flood within days." *Id.* at 1366. Respondents do not dispute this fact. *Id.* at 1369-71. Thus,



the City has a compelling interest in the outcome of this case, and urges this Court to agree with the Eleventh Circuit that such an injunction can never be an appropriate remedy.

## SUMMARY OF ARGUMENT

South Florida's regional water management system existed for decades before the enactment of the Clean Water Act in 1972. The United States Environmental Protection Agency (EPA) has never required that such transfers and diversions operate pursuant to Clean Water Act NPDES permits. To do so now, as sought by respondents, would upset decades of settled expectations and place at risk billions of dollars in public and private investment. The City and its more than sixty thousand residents are directly at risk should the District ever be forced to discontinue operation of the S-9 pump station.

The City is not insensitive to environmental issues, and is proud of its status as home of one of the largest and most successful locally funded wetland mitigation projects in the country. It and other agencies have taken many steps to control the amount and improve the quality of the stormwater runoff discharged into the District's water management system and through the S-9 pump station. These programs are projected to reduce the amount of phosphorus, a key indicator for the Everglades, by over 85% in the next three to five years. The City agrees with the District (and other *amici* supporting the District) that numerous provisions of federal, state and local law are more appropriate mechanisms than the NPDES program

to address potential sources of pollution or naturally occurring conditions in municipal stormwater.

## FACTUAL BACKGROUND

The City is located in the C-11 West Basin, Broward County, Florida, bordering the western edge of the developed area protected from catastrophic flooding by the District's levee system. The City is home to over 60,000 residents, and the taxable value of its property was nearly $5 billion in 2002. See City of Weston *2002 Performance Report*, www.westonfl.org/notices_events/annualreport/weston 2002ar.pdf,p.2 and www.westonfl.org at "Demographics." The City was incorporated in 1996, but the property comprising the City was developed beginning in the late 1970s and had been in agricultural use prior to that time. Development began following approval of a 1978 "Development of Regional Impact" by Broward County. The first residents arrived in 1984. See www.westonfl.org at "History."

Prior to its development, the City, along with the vast majority of Southeast Florida, was part of the historical Everglades. *Miccosukee*, 280 F.3d at 1366 and 1369, n.8. Water naturally flowed to the south, towards Florida Bay, and intermingled east to west. The majority of the City's stormwater runoff is collected through a system of lakes and canals. This stormwater runoff flows south, pursuant to a state permit subjecting the City to water quality requirements, into the C-11 Canal operated by the District.

The S-9 pump station, which is the object of respondents' attack, controls the water levels in the C-11 Canal



and, when necessary, transfers water from the canal into Water Conservation Area 3A. *Miccosukee*, 280 F.3d at 1366. As noted by the Eleventh Circuit, "Without the operation of the S-9 pump station, the populated western portion of Broward County would flood within days." *Id.* at 1366. Respondents do not dispute this fact. *Id.* at 1369-71.

Transfers and diversions of untreated water are essential to the design and operation of Florida's regional flood control system. The development of the City of Weston relied on the existence of this system of flood control. The City was master planned and the development process was heavily regulated by county, state and federal law. See generally Ted R. Brown, *Regulating Wetlands: The Florida Approach*, SG096 ALI-ABA 99 (2002). All aspects of the City's development were in accordance with all applicable environmental laws, and the City has never been found in violation of any of its permits.

## ARGUMENT

### I.

### ENJOINING THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT FROM OPERATING THE S-9 PUMP STATION WOULD NOT BE IN THE PUBLIC INTEREST BECAUSE OF THE RESULTING HAZARDS TO THE CITY AND ITS SIXTY THOUSAND RESIDENTS.

Without the S-9 pump station in operation, and the ability to discharge into the C-11 Canal, the City would routinely be subjected to massive flooding that would endanger lives and public and private property.

A recent example is Hurricane Irene, in October 1999. Although it was only a weak Category 1 hurricane, the City received nearly twenty inches of rain in two days according to the City's Public Works staff. See also Doug Rekenthaler Jr., et al., *Irene Drenches Florida, Brings More Rain to Flood-Weary North Carolina*, DisasterRelief.org (October 26, 1999), www.disasterrelief.org/Disasters/991018irene5/.

The flooding not only immobilized the City and damaged property; it also had a human toll. Eleven-year-old twins and their fourteen-year-old friend were shocked to death in the City, when they stepped into a puddle energized by a power line. Their mother also was killed when she stepped into the puddle in an attempt to rescue them. *Id.* Other safety and environmental hazards posed by flooding include the back-up of raw sewage into the streets, resulting from the flooding of sanitary sewer lift stations, as has occurred within the City after storms in the past. Such spills are not only immediately hazardous to human health; they also contaminate the stormwater runoff being discharged to the District's system and thus pose a danger to water quality. This is just one example of how flood control systems can be essential to the maintenance of environmental quality, as well as human life and property.

The District and City staffs routinely operate their pump stations before projected storms to lower water levels in the lakes and canals and increase the available storage capacity. See generally Martin Merzer, *Blustery storm could cause floods: Canals lowered in preparation for rain as system strengthens*, The Miami Herald (August 14, 2003), www.miami.com/mld/miamiherald/news/weather/6526708.htm. Even though staff prepared for Irene by pumping down the levels of the City's lakes and canals,



and even though the S-9 pump station was in continuous operation, the City experienced extensive flooding of roads. In some cases, water was only a foot or so away from entering homes, according to Public Works staff. It took two weeks after the storm for water levels in the system to return to normal, with all City pumps running and the S-9 pump station also running.

Without the S-9 pump in operation and without the ability to discharge to the C-11 Canal, the damage in the City would have been much more severe and long-lasting. Even if one assumes that floodwaters do not enter houses or other structures, all but the most major roadways in the City would be impassable, according to the analysis of City engineering staff. Most property would not be accessible other than by boat or helicopter, including the City's hospital, and police, fire and public works facilities. Even under ideal conditions, with a storm following a dry period, all canals being recently cleaned out, and the system at its maximum capacity, City staff estimate that it could take seven to ten days for flooding to recede under these conditions. If the storm were to follow a rainy period, there is no way to know how much longer it might take. In addition to paralyzing the City and preventing residents from accessing needed services, such sustained inundation will lead to major damage to the City's system of surface roads by undermining the integrity of the road beds and damaging asphalt surfaces. Even milder flooding, that does not render the road impassable, could damage the road base.

The excess water would be extremely damaging to the natural environment as well. The City's 1,800 acres of wetland mitigation areas are designed and managed to maintain precise water levels at approximately 4 feet

above sea level. Small mammals might be stranded or drowned, and various flora and fauna might be damaged or killed by sustained high water levels.

Petitioner asks the Court to reverse a decision by the Eleventh Circuit Court of Appeals that threatens the operation of South Florida's regional water management and flood control system. Massive amounts of public and private monies were invested in reliance on this system, and on the various permits authorizing the development of the City. Without this system, private and public property in the City will be defenseless against the ravages of flooding from storms. The City urges this Court to agree with the Eleventh Circuit that the public interest requires that the District must never be enjoined from operation of the S-9 pump station.

## II.

## A NPDES PERMIT IS NOT NECESSARY, BECAUSE OTHER FEDERAL, STATE, REGIONAL AND COUNTY REQUIREMENTS ADEQUATELY PROTECT WATER QUALITY IN THE C-11 WEST BASIN, AS SHOWN BY THE CITY'S EXAMPLE.

Weston was developed with environmental oversight from various federal, state and county regulatory agencies, and satisfied all applicable requirements. In 1976, the District issued Permit No. 06-00060-S to Arvida Corporation, the master developer of the majority of the City. The permit allowed the construction of a system of culverts, lakes and canals ultimately connecting to the C-11 Canal. The first water quality program was instituted at that time, to control the effects of the existing cattle grazing operations on the quality of stormwater runoff. Monitoring



of water quality also began at this time, and continues to the present.

In order to obtain District approvals for the residential development that was later to become the majority of the City, the developer was required to demonstrate that there would be no adverse water quality or quantity impacts to the C-11 Canal, and the Water Conservation Area 3-A into which the S-9 pump drained. District staff concluded that there would be no adverse impact on water quality from development of the project as proposed. The surface water management plan received conceptual District approval in 1978 via Permit No. 06-90002-S.

Modifications to these permits were issued later by the District, as necessitated by the continued development of the area that became the City. Each of these modifications was evaluated to ensure that no adverse water quality or quantity impacts would result. The permit required the developer, and now the City, to maintain a more extensive Water Quality Monitoring Program, which is being conducted to this day. The Program demonstrates that phosphorus levels in the City's water management system have never consistently increased, from 1976 to date, despite the nearly complete buildout of the City over that timeframe.

The system is designed to hold water before releasing it to the C-11 Canal, so that pollutants can settle out and the water is cleaner when it reaches the District's system. As part of the requirements for development of the City, all properties were required to have their own stormwater management systems that retain the first inch of runoff onsite, to allow for treatment via settling of the most polluted "first flush" of runoff following a storm.

As mitigation for the impact of its development on the environment, the developers of the City created a signature $15 million, massive wetland mitigation area. See City of Weston *2002 Performance Report*, *supra* at 9. See also areas zoned "CV" and designated "Conservation Area" (all are wetland mitigation area)on the City's Zoning Map and Existing Land Use Plan at www.westonfl.org/commission_departments/zoning.html and www.westonfl.org/commission_departments/existing.html. This mitigation was entirely funded through local and private dollars, with no federal or state funding. The project performs wetland functions including flood control, water quality enhancement, water supply preservation, wildlife habitat preservation, energy transfer and nutrient cycling.

Agencies involved in reviewing or permitting the project included the Environmental Protection Agency, the U.S. Corps of Engineers, Florida Department of Environmental Protection, the Florida Department of Community Affairs, the Florida Game and Freshwater Fish Commission, Broward County, and a variety of environmental interest groups. The mitigation area is protected through conservation easements, and contains continuing requirements for maintenance. A Wetland Quality Index Monitoring Report is used to measure whether the project is considered successful; to date, three of the five areas in the project have achieved success.

Another example of projects within the City that improve water quality is the District's planned 1,700-acre, four-foot deep Stormwater Treatment Area, through which all C-11 canal water will be routed for storage and treatment prior to reaching the S-9 pump station, which is under construction within the City. See Neil Santaniello, *Water board to spend $33 million saving Weston land from*



*development*, Sun-Sentinel (September 13, 2002) at www.sun-sentinel.com/news/local/broward/sfl-cpwater13sep13.story. See also areas zoned "AE" and designated "Vacant" (most are slated to become stormwater treatment area) on the City's Zoning Map and Existing Land Use Plan at www.westonfl.org/commission_departments/zoning.html and www.westonfl.org/commission_departments/existing.html. This area will reduce seepage, provide groundwater recharge, and function as part of the District's Comprehensive Everglades Restoration Plan, the $8 billion project being implemented by the District and various other parties. See www.evergladesplan.org and www.evergladesplan.org/pm/projects/proj_41.cfm. Construction is scheduled to be complete, and the vast majority of environmental benefit received, by the end of 2006. See Burns & McDonnell, *Final Report, Everglades Protection Area Tributary Basins, Conceptual Plan for Achieving Long-Term Water Quality Goals* (March 17, 2003) at www.sfwmd.gov/org/erd/bsfboard/waterquality.pdf, Table ES.2, p. ES-9.

A third example is that the City (through its Indian Trace Development District, which operates the relevant water management system) has entered into a voluntary interlocal agreement with the District for a Local Water Quality Monitoring Program for the C-11 West basin. See May 20, 2002 Agenda and Minutes, Item 8.J., at www.westonfl.org/commission_minutesinfo/minutes/MinutesMay202002.pdf. See also South Florida Water Management District, *Everglades Stormwater Program, Program Summary, Urban Tributary Basins Program Elements* (November 1999) pp. 15-18 at www.sfwmd.gov/org/reg/esp/pdfs/espsum/utb.pdf and *Summary of C-11 West Basin Program*, at www.sfwmd.gov/org/reg/esp/c11w.html. This Agreement involves instituting Best Management Practices for public land

management, training private landscaping companies and managers in these practices, monitoring water quality measurements, and identifying strategies to address "hot spots," if any, found within the City.

These steps will continue to reduce the phosphorus load in the City's stormwater runoff discharges to the C-11 Canal, and thereby assist the District in meeting state water quality standards under the Everglades Forever Act of 1994, Section 373.4592, Fla. Stat. (2003). However, for a variety of scientific and financial reasons, the improvements in water quality resulting from these efforts will not be realized overnight. There is no guarantee, for example, that they would allow the District to satisfy the water quality standards of the NPDES program within the next year if this Court upholds the Eleventh Circuit decision in *Miccosukee*. If they do not, the District would ultimately be faced with the short-term obligation to treat untreated water (in other words, building a costly water treatment plant to improve the water quality in the C-11 Canal, which might only be needed from the present to the end of 2006) or to curtail or cease operation of the S-9 pump station.

The District's analysis of the alternatives concluded that other options are costly, few, and inefficient, in light of the overall health of the Everglades. The Basin Specific Feasibility Study for Achieving Long-Term Water Quality Goals for the C-11 Basin recently concluded that the Basin delivers a relatively small amount of the total phosphorus load to the Everglades, and the cost of chemical treatment to meet state water quality standards immediately would be, in large part, wasted. The implementation of existing efforts by the end of 2006 as planned, with no changes, will lead to an 85% reduction in the phosphorus load at



the S-9 pump station. See Burns & McDonnell, *supra* at Map of Basin, p. ES-3 and pp. ES-4 and 3-21 through 3-24.

The cost of this duplicative requirement for the District to comply with NPDES criteria would affect the City in two ways. First, as a District permit holder flowing into the C-11 Canal, the City will inevitably be subjected to additional costly conditions designed to further assist the District in meeting its NPDES permit obligations. Second, the City and its taxpayers will be directly subjected to these unnecessary costs, because all owners of property located in the District pay substantial sums in ad valorem taxation each year towards the support of all the District's activities.[2]

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[2] Moreover, the principle of requiring an NPDES permit for movement of untreated water from one place to another raises the question of whether the City itself would be required to obtain NPDES permits for the various facilities in its stormwater management system, in addition to satisfying the District's standards and permitting requirements at the discharge into the C-11 Canal. If so, where would the line be drawn? When the water passes through a culvert from a subdivision lake into a City canal, will that culvert need a NPDES permit? If not, will it be required where two canals intersect and their waters mingle? It is hard to see what principle would limit the City's liability for a NPDES permit to its discharge point into the C-11 Canal. Like the District, the City is merely a transporter of municipal stormwater and should not be subjected to a permitting program designed to regulate those who release pollutants into navigable waters.

## CONCLUSION

For the foregoing reasons, the City respectfully requests that that the decision of the Court of Appeals for the Eleventh Circuit to require a NPDES permit for the S-9 pump station, which has serious potential negative consequences for the continued viability of the City, be reversed.

Respectfully submitted,

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# In The Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF *AMICI CURIAE* OF THE STATES OF COLORADO AND NEW MEXICO IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Does the mere diversion and delivery, from one stream or water body to another, of water that contains pollutants require a National Pollutant Discharge Elimination System permit under the federal Clean Water Act, 33 U.S.C. §§ 1251-1387?

TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | 6 |
| I. The Eleventh Circuit's Opinion is Contrary to the Plain Language of the Clean Water Act and Congress's Intent to Defer to the States' Allocation of Water | 6 |
| A. Congress Expressly Rejected Interference with State Water Law | 6 |
| B. Section 101(g) of the Clean Water Act Expresses a Clear Intent to Protect State Water Allocations | 8 |
| C. The Legislative History of Section 101(g) Confirms Congress's Intent to Refrain From Interfering with State Water Law and Allocations | 9 |
| II. Requiring NPDES Permits For Transbasin Diversions Would Interfere With the States' Water Allocation Laws | 11 |
| A. The Supreme Court and Congress Have Long Deferred to the States' Water Allocation Laws, Beginning with the Equal Footing Doctrine | 12 |
| B. Requiring NPDES Permits for Transbasin Diversions/Deliveries Would Abrogate Water Allocations Because Diverters Would Have to Forgo the Full Exercise of Their Water Rights to Comply with Permit Conditions | 15 |




TABLE OF CONTENTS – Continued


| | Page |
|---|---|
| C. Requiring NPDES Permits for Transbasin Diversions/Deliveries Would Interfere with the Maximum Utilization of the States' Water Resources | 18 |
| D. Requiring NPDES Permits For Transbasin Diversions/Deliveries Would Interfere with Interstate Water Allocations | 20 |
| III. States Can and Do Appropriately Address Water Quality Impacts from the Diversion/ Delivery of Water | 22 |
| A. State "Water Quantity Law" Permits the Conveyance of Water for Beneficial Uses But Not for Waste Disposal | 23 |
| B. State "Water Quality Law" Appropriately Addresses the Water Quality Effects of Transbasin Diversions/Deliveries | 26 |
| CONCLUSION | 29 |

## TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546 (1963) ..... 21

Atchison v. Peterson, 87 U.S. 507 (1874) ..... 23

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) ..... 6, 13

California v. United States, 438 U.S. 645 (1978) ..... 12, 14

City of Los Angeles v. City of Glendale, 23 Cal.2d 68 (1943) ..... 19

Dingwell v. Town of Litchfield, 4 Conn. App. 621, 496 A.2d 213 (1985) ..... 27

Dubois v. United States Dep't of Agric., 102 F.3d 1273 (CA1 1996) ..... 29

Envtl. Def. Fund, Inc. v. E. Bay Mun. Dist., 26 Cal.3d 183, 605 P.2d 1 (1980) ..... 26

Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957) ..... 24

Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1968) ..... 18

Fox River Paper Co. v. R.R. Comm'n of Wisconsin, 274 U.S. 651 (1927) ..... 13

Gregory v. Ashcroft, 501 U.S. 452 (1991) ..... 6

Hoffman v. Stone, 7 Cal. 46 (1857) ..... 19

In Re Concerning Application for Plan for Augmentation of the City and County of Denver, 44 P.3d 1019 (Colo. 2002) ..... 27

Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (CA10 1981) ..... 18



## TABLE OF AUTHORITIES – Continued

Page

Joslin v. Marin Mun. Water Dist., 67 Cal.2d 132, 429 P.2d 889 (1967) ..... 24

Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 417, 467 P.2d 986 (1970) ..... 18

Kansas v. Colorado, 206 U.S. 46 (1907) ..... 12, 13, 15

Leo v. Gen. Elec. Co., 145 A.D.2d 291, 538 N.Y.S.2d 844 (1989) ..... 27

Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist., 280 F.3d 1364 (CA11 2002) ... 1, 3, 5, 30

Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1983) ..... 28

N. Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155 (CA9 2003) ..... 29

Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (CADC 1982) ..... 22

Penn. R.R. v. Sagamore Coal Co., 281 Pa. 233, 126 A. 386 (1924) ..... 27

Phillips v. Davis Timber Co., Inc., 468 So. 2d 72 (Miss. 1985) ..... 27

Planning and Conservation League v. Dep't of Water Resources, 83 Cal. App. 4th 892, 100 Cal. Rptr.2d 173 (2000) ..... 19

PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994) ..... 26, 27

Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (CA10 2003) ..... 23

Sharp v. 251st St. Landfill, Inc., 925 P.2d 546 (Okla. 1996) ..... 27

TABLE OF AUTHORITIES – Continued

Page

Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985) ..... 25

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) ..... 6, 7

Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996) ..... 24

Tulkisarmute Native Comty. Council v. Heinze, 898 P.2d 935 (Alaska 1995) ..... 25

United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (CA9 1983) ..... 23

United States v. Lopez, 514 U.S. 549 (1995) ..... 6

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1898) ..... 14

Wisniewski v. Gemmill, 123 N.H. 701, 465 A.2d 875 (1983) ..... 25

STATUTES

Act to provide for the Admission of the State of Wyoming into the Union, ch. 664, 26 Stat. 222 (1890) ..... 13

ARIZ. REV. STAT. § 45-181(1) (2002) ..... 23

CALIFORNIA WATER CODE § 7075 (2002) ..... 19

Clean Water Act, 33 U.S.C. § 1313 ..... 3

Clean Water Act, 33 U.S.C. § 1313(d) ..... 17

Clean Water Act, 33 U.S.C. § 1341(a)(1) ..... 26

Clean Water Act, 33 U.S.C. § 1370 ..... 9

Clean Water Act, 33 U.S.C. § 1251 ..... 7, 8, 9

Clean Water Act, 33 U.S.C. § 1344 ..... 26



TABLE OF AUTHORITIES – Continued

Page

COLO. REV. STAT. § 25-8-101(1) (2002) ..... 29

COLO. REV. STAT. § 25-8-104 (2002) ..... 29

COLO. REV. STAT. § 25-8-202(7)(b)(A) (2002) ..... 29

COLO. REV. STAT. § 25-8-205(1)(c) (2002) ..... 28

COLO. REV. STAT. § 25-8-503(5) (2002) ..... 28

COLO. REV. STAT. § 31-15-707(1) (2002) ..... 28

COLO. REV. STAT. § 37-80-120 (2002) ..... 19

COLO. REV. STAT. § 37-83-104 (2002) ..... 19

COLO. REV. STAT. § 37-92-308(7) (2002) ..... 20

Colorado River Compact, 42 Stat. 171 (1921) ..... 20

Crested Butte, [Colo.], Town Code, ¶ 14-5-10(B) (2003) ..... 28

Desert Land Act of 1877, ch. 107, 19 Stat. 377 (1877) ..... 13

Federal Reclamation Act, 43 U.S.C. § 383 ..... 13, 14

FLA. STAT. § 373.019(13) (2002) ..... 25

FLA. STAT. § 373.223(1) (2002) ..... 25

Joint Resolution to Admit the Territories of New Mexico and Arizona as states into the Union, Pub. Res. 8, 37 Stat. 39 (1911) ..... 13

Mining Act of 1866, *codified at* 43 U.S.C. § 661 ..... 13

Mining Act of 1870, 16 Stat. 218, *codified at* 30 U.S.C. §§ 51, 52 ..... 13

MONT. CODE. ANN. § 85-2-102 (2002) ..... 23

N.M. CONST., art. XVI, § 2 ..... 13

TABLE OF AUTHORITIES – Continued

Page

National Environmental Policy Act, 42 U.S.C. § 4321 ..... 17

Rio Grande Compact, 53 Stat. 785 (1939) ..... 20

WYO. CONST., art. VIII, § 1 ..... 13

OTHER AUTHORITIES

42 Fed. Reg. 36,788 (July 15, 1977) ..... 10

42 Fed. Reg. 36,793 (July 15, 1977) ..... 10

H.R. CONF. REP. No. 95-830, at 52 (1977), *reprinted in* 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 ..... 11

S. DEB.: August 4, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY at 1030 ..... 10

S. DEB.: Dec. 15, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY at 531 ..... 11

REGULATIONS

33 C.F.R § 325.2(b) (2002) ..... 26

33 C.F.R. § 330.4(c) (2002) ..... 26

40 C.F.R. § 122.21(c) (2002) ..... 20

40 C.F.R. § 122.44(d)(1)(i) (2002) ..... 15

40 C.F.R. § 123.25 (2002) ..... 20

40 C.F.R. § 124.10(b) (2002) ..... 20

40 C.F.R. § 124.15(a) and (b) (2002) ..... 20

40 C.F.R. § 130.7 (2002) ..... 17

40 C.F.R. § 131.12 (2002) ..... 17



## INTEREST OF *AMICI CURIAE*

*Amici curiae*, the Attorneys General of Colorado and New Mexico, joined by other states listed on the inside cover of this brief, submit this brief in support of Petitioner South Florida Water Management District seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 280 F.3d 1364 (CA11 2002) ("*Miccosukee*").[1]

The Eleventh Circuit decision would impose permitting requirements on the simple diversion and delivery of water in an unaltered condition from one basin to another basin. These requirements would interfere with the states' ability to meet the needs of their residents and to meet their obligations under interstate water compacts. In addition, the decision would impair individual water rights as a water right owner could be forced to give up or reduce water diversions or construct prohibitively expensive treatment facilities in order to meet these permitting requirements.

All fifty states allocate the waters within their boundaries for "beneficial" or "reasonable" use under one of two prevailing legal doctrines. The arid western states generally follow the prior appropriation doctrine whereas other states use the riparian doctrine. The holding of the Eleventh Circuit would substantially and inappropriately

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[1] The eighteen member states of the Western States Water Council recently adopted, by a vote of fifteen with three abstentions, a resolution opposing a requirement that transbasin diversions/deliveries obtain a discharge permit unless the purpose of the diversion/delivery is waste disposal.

interfere with the operation of state water laws established under both doctrines.

West of the 100th Meridian, the nation is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Unfortunately, the timing and location of precipitation do not correlate well with on-the-ground demands. Hence, it is necessary to divert and deliver water through a complex system of manmade and natural conveyances and reservoirs that operate under some form of the prior appropriation system. This allows the West to sustain its cities, farms and ranches. Without this system, many nationally important agricultural regions could not support crops, including Weld and Larimer Counties in Colorado, the Central and Imperial Valleys of California, the Snake River Valley of Idaho and the Yakima Valley of Washington. Without this system, many of the West's great cities, including Albuquerque, Denver, Las Vegas, Los Angeles, Phoenix, San Francisco and Salt Lake City, simply would not have flourished.

In Colorado, forty-nine major transbasin diversions/deliveries move an average of 550,000 acre feet per year of water ("af/year") to supplement supplies in other basins. Transbasin diversions/deliveries include the Colorado-Big Thompson/Windy Gap Projects, which deliver nearly 280,000 af/year to supplement the water supplies of thirty cities and towns and over 600,000 acres of farmland. Colorado Springs employs six transbasin diversions/deliveries to move 75,000 af/year, eighty percent of its total supply, to city residents. Denver similarly moves over 200,000 af/year through two transmountain tunnels to meet nearly half the city's needs. Sixty percent of Coloradans depend on transbasin diversions/deliveries for at least



part of their domestic supplies. In addition, over fifty percent of Colorado's irrigated farmland relies on transbasin diversions/deliveries. To date, none of these facilities has been subjected to National Pollutant Discharge Elimination System ("NPDES") permitting.[2]

Under the "but for" test of *Miccosukee*, at each point where a ditch, canal, tunnel or pipeline delivers its water to a stream or reservoir, a permit, including terms and conditions, would be required if the water would not have reached that point "but for" man's action.[3] For example, the Fort Lyon Canal in the Arkansas River Basin, Colorado's driest watershed, carries water from the Arkansas River and two reservoirs for 113 miles almost to the Kansas State Line. It serves 93,000 acres of irrigated farmland, in the process crossing or flowing through seven creeks and arroyos and two reservoirs. The Eleventh Circuit's opinion would require the Canal's operator to obtain as many as nine permits. The water of the Arkansas River is high in total dissolved solids, so the Canal's operator might have to build one or more water treatment

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[2] Colorado has at least several hundred transbasin diversions/deliveries in the state that could require permits under the holding of *Miccosukee*. The water quality of Colorado's streams and lakes is generally excellent without the imposition of NPDES permits on transbasin deliveries. Of its 107,403 miles of streams, only 4,964 (4.6%) are designated as "impaired," not meeting water quality standards or designated uses, under the Clean Water Act, 33 U.S.C. § 1313. There is no evidence that transbasin diversions/deliveries are the cause of any of these impairments.

[3] "[F]or an addition of pollutants to be from a point source, the relevant inquiry is whether – but for the point source – the pollutants would have been added to the receiving body of water." *Miccosukee*, 280 F.3d at 1368.

plants in order to meet NPDES permit requirements. This is neither financially nor technically feasible for canal shareholders, many of whom are economically-depressed farmers and ranchers.

In New Mexico, the San Juan-Chama Project diverts 90,500 af/year on average from the Colorado River Basin through transmountain tunnels to the Rio Grande Basin. The Project provides water to the cities of Albuquerque and Santa Fe, to farmers in the Middle Rio Grande Conservancy District, and to Indian Tribes and Pueblos. By offsetting depletions in the Rio Grande Basin, the San Juan-Chama Project water allows New Mexico to make full use of its allotment under the Rio Grande Compact. In the absence of the San Juan-Chama Project, the City of Albuquerque would be forced to rely upon pumping from non-renewable aquifers for its municipal supplies, other cities and Pueblos would be left critically short of a supply, and thousands of acres of farmland in the Middle Rio Grande valley would lose their irrigation supply. In times of severe drought like 2002-2003, imported water from the San Juan-Chama Project provides much of the water in storage in the Middle Rio Grande valley in New Mexico.

In Arizona, the Central Arizona Project moves 1.5 million af/year from the Colorado River Basin to supplement dwindling groundwater supplies in the Phoenix and Tucson areas. In the upper Colorado River Basin, at least thirty-six major transbasin diversions/deliveries move 700,000 af/year of Colorado River water into other basins in Colorado, New Mexico, Utah and Wyoming.

California's State Water Project is the largest transbasin transfer in the country, delivering up to 4.7 million af/year through the San Francisco Bay Delta to provide



supplemental water to twenty million Californians and 660,000 acres of irrigated farmland. The Bureau of Reclamation's Central Valley Project similarly delivers about 7.3 million af/year to irrigate 2.6 million acres and for urban and wildlife uses. In addition, diversions/deliveries from the Colorado River to Southern California for irrigation and municipal use total 4.5 to 5.2 million af/year.

## SUMMARY OF ARGUMENT

The economic and social well-being of the West and the nation depend on the ability to divert and move water resources pursuant to state law. At risk as a result of the Eleventh Circuit decision is the continued ability to divert freely water from one basin for delivery in another basin in order to meet municipal, agricultural and industrial demands.

The Eleventh Circuit decision in *Miccosukee* would impose discharge permit requirements under the Clean Water Act on transbasin diversions/deliveries. Such permit requirements would interfere with the states' ability to allocate their waters to meet the needs of their citizens and to comply with interstate compacts. Water diverters would face losing the use of some or all of their water rights in order to meet permit requirements.

This interference in state water law is contrary to the deference historically shown by Congress and this Court to the states in matters of water allocation and use. The Clean Water Act clearly expresses Congress's intent to honor long-standing federal deference to state water law. It certainly lacks any "clear statement" that Congress intended to alter this established federal-state framework.

In the Clean Water Act, Congress appropriately deferred to the states to protect water quality while allocating water resources to meet the needs of their citizens. The states are well equipped to perform this task under state law.

## ARGUMENT

### I. The Eleventh Circuit's Opinion is Contrary to the Plain Language of the Clean Water Act and Congress's Intent to Defer to the States' Allocation of Water.

Congress expressed its clear intent to honor state water allocation law in the plain language of the Clean Water Act ("Act"), as confirmed by the Act's legislative history. The holding in *Miccosukee* directly conflicts with the language in the Act and Congress's intent.

#### A. Congress Expressly Rejected Interference with State Water Law.

Land and water use decisions are traditionally and primarily state prerogatives. *See Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). As the Court reiterated in *SWANCC*, where a statutory interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly convey its intent. *Id.* at 173. *See also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Requiring NPDES permits for the simple movement of water from one basin to another would intrude upon matters



that are "subject to the plenary control of the designated states . . . ." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164 (1935). Under the Eleventh Circuit opinion, this unwarranted intrusion on state sovereignty occurs in the face of a clear directive from Congress that it intended to respect the ability of states to control and manage their water resources.[4]

The opening provision of the Clean Water Act clearly demonstrates Congress's intent to preserve the historical federal-state balance concerning the allocation of water.

> *Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, *to plan the development and use* (including restoration, preservation, and enhancement) *of land and water resources*, and to consult with the Administrator in the exercise of his authority under this chapter."

*SWANCC*, 531 U.S. at 166-67 (quoting 33 U.S.C. § 1251(b)) (emphasis added). Congress did not intend to interfere with state water law or allocations.[5] The Eleventh Circuit decision is in derogation of that congressional directive.

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[4] It cannot be forgotten that the owners and operators of the water systems are not adding pollutants to any water diverted/delivered; they are simply moving unaltered water from one water body to another.

[5] States, in the exercise of state law, *may* require transbasin diversions to be permitted, but the states should not be required to do so.

### B. Section 101(g) of the Clean Water Act Expresses a Clear Intent to Protect State Water Allocations.

Congress adopted section 101(g) as part of its 1977 amendments to the Clean Water Act:

> It is the policy of Congress that *the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired* by this chapter. It is the further policy of Congress that *nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State*. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g) (emphasis added). In plain language Congress declared that the authority of each state to allocate quantities of water will not be impaired by the Act. Congress did not stop there. Congress took another step and pledged that nothing in the Act will be construed to abrogate water rights established by any state. Rather, to the extent water quality concerns arise in the context of water allocation decisions, the federal government is to cooperate with the states in developing appropriate solutions outside of the regulatory directives of the point source permit program.[6]

[6] *See* Petitioner's brief for an explanation of the section 402 NPDES point source permitting program.



In adopting section 101(g), Congress built upon language in 1972 Amendments to the Act that already recognized federal deference to the states.

> It is the policy of Congress to recognize, preserve, and *protect the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, *to plan the development and use* (including restoration, preservation, and enhancement) *of land and water resources*, and to consult with the Administrator in the exercise of his authority under the chapter.

33 U.S.C. § 1251(b) (emphasis added). Similarly, section 510 of the 1972 Amendments declared "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting *any right or jurisdiction of the States with respect to the waters* (including boundary waters) of such States." 33 U.S.C. § 1370 (emphasis added). Thus, as it refined the Act over the years Congress progressively reinforced federal deference to state water law and allocations made thereunder. Requiring discharge permits for the simple conveyance of water directly conflicts with Congress's plain language.

### C. The Legislative History of Section 101(g) Confirms Congress's Intent to Refrain From Interfering with State Water Law and Allocations.

The legislative history of section 101(g) of the Act expressly confirms Congress's intent to reaffirm the longstanding tradition of federal deference to state

jurisdiction over water use decisions. The Senate adopted the Wallop/Hart amendment[7] in response to suggestions that reducing water diversions/deliveries under state water law might be necessary to solve water quality problems.[8] The Conference Committee, which included Senators Malcolm Wallop and Gary Hart, made minor changes to the language of the amendment and added it to the legislative declaration, explaining:

> [I]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction should not be superseded, abrogated or otherwise impaired by this Act . . . . [and] that nothing in this Act should be construed to supersede or abrogate rights to quantities of water that have been established by any State.

[7] During the Senate debate, Senator Malcolm Wallop explained the purpose of the Wallop/Hart provision. "The amendment simply states that nothing in the act shall be construed to supersede or abrogate or in any other way, affect any authority now vested in any State to establish or operate programs for the allocation of quantities of water within its respective boundaries, or any rights to or allocations of quantities of water which have been established pursuant to such program." S. DEB.: August 4, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY at 1030.

[8] The amendment was prompted by concerns over proposals contained in "the Issue and Option Papers for the Water Resource Policy Study . . . conducted by the Water Resource Council," released three weeks earlier. 42 Fed. Reg. 36,788 (July 15, 1977). Several provisions in the Water Resource Council's Issue Paper ("WRC Paper") threatened the integrity of the states' water allocation laws. For example, the WRC Paper concluded that *reducing water diversions/deliveries* under state water rights might be necessary to solve water quality problems. *Id.* at 36,793. The WRC Paper even proposed withholding federal contributions to state pollution control programs unless a state changed its water allocation law to manage water rights for federal water quality purposes. *Id.*



H.R. CONF. REP. No. 95-830 at 52 (1977), *reprinted in* 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 at 236 (1978) (hereinafter "1977 LEGISLATIVE HISTORY").

Senator Wallop explained the Conference Substitute in similar terms on the Senate floor:

> The conferees accepted an amendment which will reassure the State [sic] that *it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems.*
>
> * * *
>
> The amendment simply states that *it is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this act. It also states that it is the further policy of Congress that nothing in this act will be construed for the purpose of superseding or abrogating rights to quantities of water which have been established by a State.*

S. DEB.: Dec. 15, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY at 531 (emphasis added).

The legislative history of section 101(g) clearly confirms that Congress intended to leave historical deference to state water law undisturbed, while recognizing a more general federal role in protecting water quality. Where water quality and quantity concerns intersect, the state's authority over quantity is to remain inviolate.

## II. Requiring NPDES Permits for Transbasin Diversions Would Interfere with the States' Water Allocation Laws.

The Eleventh Circuit decision interferes with fundamental aspects of the appropriation doctrine of beneficial

use because requiring NPDES permits for simple trans-basin diversions/deliveries would supersede (reduce) state-established quantitative limits on water rights. Permit conditions that prevent the physical conveyance and use of some or all of the water legally available under individual water rights allocated under state law would directly abrogate state water allocations. Such federal interference has important implications, not only for individual water rights, but also for comity among the states under interstate compacts and equitable apportionments and for the maximum utilization of scarce water resources.

### A. The Supreme Court and Congress Have Long Deferred to the States' Water Allocation Laws, Beginning with the Equal Footing Doctrine.

In the complicated field of federal-state relationships, the Supreme Court and Congress have spoken with a clear and consistent voice regarding the allocation of water. As the Court observed in its landmark decision in *California v. United States*, 438 U.S. 645, 653 (1978):

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

Federal deference to state water allocation law began with the "equal footing" doctrine. Under that doctrine, Congress granted the Western states, upon their admission into the Union, sovereignty over the unappropriated waters in their streams. *See Kansas v. Colorado*, 206 U.S. 46, 94 (1907);[9] *Fox River Paper Co. v. R.R. Comm'n of Wisconsin*, 274 U.S. 651, 655 (1927).



Congress reaffirmed its deference to states' water allocation laws when it passed the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (1877). *See also* Mining Act of 1866, *codified at* 43 U.S.C. § 661; Mining Act of 1870, 16 Stat. 218, *codified at* 30 U.S.C. §§ 51, 52; *California Oregon Power Co.*, 295 U.S. 142 (The Desert Land Act effected a severance of all waters upon the public domain and reserved such water for use under the laws of the states). Congress repeatedly reaffirmed federal deference to state water law when it ratified western states' constitutions in their acts of admission.[10] The federal Reclamation Act of 1902 ("Reclamation Act") similarly affirmed this principle. 32 Stat. 388 (1902), *codified at* 43 U.S.C. § 383.[11]

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[9] In *Kansas v. Colorado*, Kansas argued that Congress had expressly applied English common law to both states and that the common law included the riparian system of water rights. The Court rejected this view and held "[each state] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." 206 U.S. at 94.

[10] For example, the WYO. CONST., art. VIII, § 1 states "[t]he water of all natural streams, springs, lakes or other collections of still water . . . are hereby declared to be the property of the state." *See* Act to provide for the Admission of the State of Wyoming into the Union, ch. 664, 26 Stat. 222 (1890). N.M. CONST., art. XVI, § 2, provides "[t]he unappropriated water of every natural stream . . . is hereby declared to belong to the public and to be subject to appropriation for beneficial use." *See* Joint Resolution to Admit the Territories of N.M. and Ariz. as states into the Union, Pub. Res. 8, 37 Stat. 39 (1911).

[11] The Act authorized the federal government to construct water resource development projects. However, section eight of the 1902 Act specifically provided that:

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In 1978, the Court cemented federal deference to state water law in the case of *California v. United States*, 438 U.S. 645. In that case, the United States challenged California's authority to impose conditions on the operation of New Melones Reservoir, a federal reclamation facility. The Court rejected the United States' arguments and concluded that section eight of the federal Reclamation Act required the federal government "to comply with state [water] law in the 'control, appropriation, use, or distribution of water.'" *California v. United States*, 438 U.S. at 675. In reaching this conclusion, the Court relied upon its earlier decisions. "[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters." *Id.* at 662 (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).

It is important to note that the Court also made it clear that federal deference is not unique to the West, but applies nationally.

> [A]rid lands are to be found mainly, if not only[,] in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.

*Id.* at 655 (quoting *Kansas v. Colorado*, 206 U.S. at 92).

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Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

43 U.S.C. § 383.



### B. Requiring NPDES Permits for Transbasin Diversions/Deliveries Would Abrogate Water Allocations Because Diverters Would Have to Forgo the Full Exercise of Their Water Rights to Comply with Permit Conditions.

Under the Eleventh Circuit opinion, many diverters would have no alternative but to curtail their diversions/deliveries to meet NPDES permitting conditions. If a discharge merely has "the potential to cause . . . an excursion above any State water quality standard," its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i) (2002). Thus, an NPDES permit required under *Miccosukee* would necessarily contain conditions that would limit the amount of pollutants delivered to the receiving water body. Transbasin diversions/deliveries in the West generally peak during spring snow melt when the most water is available, and levels of total suspended dissolved solids are commonly elevated.[12]

To avoid the potential to cause an excursion above the water quality standards of the receiving water body during spring runoff, a transbasin diverter might have to expend millions of dollars to construct a treatment facility or implement so-called best management practices in an

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[12] Up to eighty percent of the precipitation in Colorado falls as snow, for example.

attempt to reduce the presence of even natural pollutants.[13] The facility would be required to treat peak diversions, which might occur only one or two days a year, in order to protect the water quality of the receiving water body,[14] while sitting idle for most of the year.[15]

As an alternative to sizing a treatment plant to accommodate maximum diversions/deliveries, a diverter could attempt to construct a surge reservoir in order to feed water at a constant rate into the treatment facility. Given the location of many such diversions on federal lands in high mountain areas and the volume of water involved, neither approach may be economically, technically or politically feasible.[16] In addition, such new

[13] Thunderstorms create similar problems. In addition, most water conveyances in the West are open ditches and canals and are directly impacted by runoff.

[14] For example, the Colorado-Big Thompson Project delivers transbasin water at rates up to 1,293 million gallons per day (MGD), four times the capacity of the largest existing treatment plant in Colorado. Average diversions are 220,000 af/year, or 203 MGD. Thus, the treatment plant might have to be sized to meet peaking flows of 425 percent of average. Similarly, the San Juan-Chama Project in New Mexico has a capacity to divert up to 614 MGD, 750 percent of the average diversions, 81 MGD. The California State Water Project diverted 5.2 million af in 1997 from the San Francisco Delta, or an average of 4,642 MGD. For comparison, the Metropolitan Water District of Southern California, the largest municipal water provider in the United States, delivers an average of 1,700 MGD of raw and treated water, about a third of the Delta transbasin diversions.

[15] Fifty percent of Colorado's mountain streamflows occurs in just three months: May, June and July.

[16] Many transbasin conveyances are located on federal land, including national parks and national forests adjacent to wilderness areas. Permitting a treatment facility and/or surge reservoir would

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construction would have its own environmental consequences. Instead, diverters would have no alternative but to curtail diversions/deliveries to meet NPDES permit conditions, effectively relinquishing a part of their state-allocated water right.[17]

invoke the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f, which can be costly and time consuming.

[17] In addition, if the transbasin movement of water containing natural pollutants is held to require a permit under section 402, such water movement would also be subject to the total maximum daily load (TMDL) provisions of section 303(d) for "areas with insufficient controls" ("impaired" waters). 33 U.S.C. § 1313(d). A TMDL defines the specified maximum amount of each pollutant that can be discharged ("loaded") into the water from all combined sources without exceeding water quality standards. 40 C.F.R. § 130.7 (2002). The TMDL is allocated among point and nonpoint sources so that water quality standards can be achieved. Each point source receives a specific waste load allocation, which is implemented through section 402 discharge permits. *Id.* In many cases, the only practical way for transbasin diverters to curtail pollutant loadings would be to reduce diversions/deliveries because they could not satisfy waste load allocations without costly storage or treatment. As a result, they would have to forgo full use of their state water rights.

Where the quality of waters "exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water," antidegradation provisions apply to maintain and protect existing uses. 40 C.F.R. § 131.12(2) (2002). Discharges cannot lower existing water quality absent a "necessity" determination, which would include an alternatives analysis. (A state may allow degradation if it finds that "allowing lower water quality is necessary to accommodate important economic or social development in the areas in which the waters are located." 40 C.F.R. § 131.12(a)(2) (2002). Although transbasin water is often suitable for beneficial use without treatment, transbasin deliveries would be subject to this requirement under the Eleventh Circuit's holding. *Id.* Similar to deliveries to impaired waters, the only practical way for many transbasin diverters to meet antidegradation requirements for high quality waters would be to curtail

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### C. Requiring NPDES Permits for Transbasin Diversions/Deliveries Would Interfere with the Maximum Utilization of the States' Water Resources.

As evidenced by the devastating drought and accompanying fires of the past few years in the western United States, there is a pressing need to maximize the use of scarce water resources. Maximum utilization of water resources is enhanced by innovative state programs, such as dry-year transfers of water from agricultural to urban use, conjunctive (cooperative) use of surface and groundwater, and aquifer recharge.[18] States and water users also regularly bank, exchange and augment their water supplies, and even reclaim and reuse wastewater. Each of these strategies employs water that is under-utilized or that would otherwise be wasted and turns it into a valuable asset to meet agricultural, municipal and industrial water needs.[19] In many western states, however,

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diversions/deliveries, forgoing the use of a portion of their state water right.

[18] *See, e.g., Fellhauer v. People*, 167 Colo. 320, 336, 447 P.2d 986, 994 (1968) ("As administration of water approaches its second century the curtain is opening upon the new drama of *Maximum utilization*") (emphasis added); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (CA10 1981) [quoting *Kaiser Steel Corp. v. W.S. Ranch Co.*, 81 N.M. 414, 417, 467 P.2d 986, 989 (1970) ("utilization [of water] for maximum benefits is a requirement second to none, not only for progress but for survival"), and concluding that "[m]aximum utilization then is a fundamental requirement which prevents waste of water.")

[19] An extensively used strategy in Colorado for improving water system efficiency and yield is exchanges, which are a legal and engineering approach for minimizing capital, transmission, and/or treatment costs. In an exchange, a water user is allowed to take water from a new location on the stream or a different source, such as another tributary, but only if the water is replaced elsewhere and in a manner

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such water supply innovations are available only as a direct consequence of the ability to transport water utilizing natural watercourses from a basin with an excess to a basin with a shortage.[20] Requiring an NPDES

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that ensures no injury to other water rights. *See* COLO. REV. STAT. §§ 37-80-120, 37-83-104 (2003). The City of Denver relies on exchanges to supply its customers reliably and efficiently.

California began utilizing large-scale water transfers involving the State Water Project to ameliorate drought in 1991. In addition, conjunctive use of surface and ground water, the storage of surface supplies in times of plenty in underground aquifers for subsequent withdrawal and use, is the basis of the Kern Water Bank, another drought-management strategy. *See Planning and Conservation League v. Dep't of Water Resources*, 83 Cal. App. 4th 892, 100 Cal. Rptr.2d 173 (2000).

[20] For example, California Courts have consistently concluded that the realities of western water development require that those who develop surface water supplies be allowed to use natural channels to convey and deliver these supplies where they are needed. As early as 1857, the California Supreme Court noted:

> It would be a harsh rule, however, to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or cañon.

*Hoffman v. Stone*, 7 Cal. 46 (1857).

The California Supreme Court noted the importance of this rule (codified in CALIFORNIA WATER CODE § 7075 (2002)) in reviewing the propriety of Los Angeles' water distribution system:

> By availing itself of these natural reservoirs, it spared its citizens the cost of financing the construction of additional dams, if, indeed, appropriate sites were available at the lower end of the aqueduct. Early in the history of the state, this court recognized the advantage of permitting the use of natural surface facilities, stream beds, dry canyons and the like, for the transportation of water . . . .

*City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 76-77 (1943) [citations omitted].

permit and accompanying controls on each transbasin diversion would stifle these critical water management initiatives, since permit requirements would stand in the way of simply moving the water from one basin or subbasin to another. For example, even if the construction of a new treatment facility were not required, it may be impossible to obtain an NPDES permit in time to allow a new transbasin delivery to address a drought emergency in another basin.[21] Similarly, a time-consuming permitting process would curtail the use of "water banks" as a mechanism to effectuate such water transfers.[22]

### D. Requiring NPDES Permits for Transbasin Diversions/Deliveries Would Interfere with Interstate Water Allocations.

A significant number of transbasin water diversions/deliveries occur on interstate stream systems, the waters of which have been allocated among the states by interstate compact or Supreme Court decree.[23] Requiring

[21] The minimum time between submission of an application and issuance of a permit is 210 days, not including time to prepare the application or time for the permitting agency to review the application and write the permit. *See* 40 C.F.R. § 122.21(c) (permit application shall be submitted 180 days before discharge), 124.10(b) (30 day public comment period), 124.15(a) and (b) (permit effective 30 days after agency decision unless no comments requested changes), 123.25 (2002). In contrast, Colorado can immediately approve an emergency water transfer under state law. COLO. REV. STAT. § 37-92-308(7) (2002).

[22] A water bank is a formal mechanism for pooling water for rental to other users.

[23] *See, e.g.*, Colorado River Compact, 42 Stat. 171 (1921) (Ariz., Cal., Colo., Nev., N.M., Utah, Wyo.); Rio Grande River Compact, 53

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permits under the Clean Water Act for these water transfers would pose significant problems for such interstate allocations.

States may not be able to fully utilize their compact entitlements if technically or economically impossible NPDES permit conditions prevent transbasin deliveries of surplus water to other basins with unmet demands.[24] For example, Colorado uses much of its surplus Colorado River Compact entitlement to meet needs in the water-short South Platte River and Arkansas River Basins. Similarly, New Mexico uses much of its Colorado River entitlement in the Rio Grande Basin, and Arizona uses most of its Colorado River entitlement in the Gila River and Salt River Basins. California also uses much of its Colorado River Compact water outside the basin in order to serve municipalities along its southern coast.

Transbasin diversions/deliveries can also be a significant source of waters necessary to mitigate the impact of excess "native water" diversions in the receiving basin. In other words, return flows from transbasin diversions/deliveries; i.e., imported waters, can be an essential part of the supply a state uses to meet interstate obligations to downstream states. New Mexico indirectly relies on transbasin deliveries from the Colorado River Basin (through exchange) to satisfy native Rio Grande water rights, leaving Rio Grande water to meet compact obligations to Texas from the Colorado River Basin. In the

Stat. 785 (1939) (Colo., N.M., Tex.); *Arizona v. California*, 373 U.S. 546 (1963) (allocating the lower Colo. River among Ariz., Cal. and Nev.).

[24] *See* II.B.

severe drought of 2003, New Mexico would have been forbidden from storing water in the Rio Grande Basin if water from transbasin diversions/deliveries had not been available, leaving cities such as Santa Fe with a critically short supply.[25]

## III. States Can and Do Appropriately Address Water Quality Impacts from the Diversion/ Delivery of Water.

State control over the use of water resources represents sound public policy, according to the D.C. Circuit. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 182 (CADC 1982). Water quality impacts associated with dams and diversions "may not be amenable to the nationally uniform controls contemplated by § 402 because pollution problems are highly site-specific . . . ." *Id.* at 177, n. 62.

States have established laws to appropriately protect water quality while allocating water resources to meet the needs of their citizens. These laws explain why there is no evidence that the historic absence of NPDES permitting requirements on transbasin diversions/deliveries causes significant water quality problems, and why reversing the Eleventh Circuit decision would not lead to adverse water quality impacts.

[25] Since there were less than 400,000 af of usable water in storage in the Rio Grande Project by the end of 2002, the Rio Grande Compact prohibited New Mexico from storing water for the benefit of Texas in reservoirs constructed after 1929. Rio Grande Compact, art. 7, 53 Stat. 785 (1939). All the reservoirs above Elephant Butte in New Mexico were constructed after 1929.



### A. State "Water Quantity Law" Permits the Conveyance of Water for Beneficial Uses But Not for Waste Disposal.

The states have adopted one or both of two overlapping doctrines for the allocation of water for use. The western states generally follow the prior appropriation doctrine.[26] The riparian doctrine is prevalent in the East.

In prior appropriation states, water may be diverted only for beneficial use. *Atchison v. Peterson*, 87 U.S. 507, 514 (1874). "*Beneficial use* is 'a restrictive concept of valid water uses in the water law of the arid western states requiring that water only be *used for purposes that are beneficial to the user and to society in general, such as irrigation and municipal uses.*'" *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1132 n. 33 (CA10 2003) (emphasis added). "[O]n the point of what is beneficial use the law is 'general and without significant dissent.'" *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (CA9 1983).[27]

[26] The prior appropriation doctrine is generally followed west of the 100th Meridian, where natural precipitation is inadequate for crop production; i.e., Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, New Mexico, Utah and Wyoming. California, Kansas, Mississippi, Nebraska, North Dakota, Oregon, South Dakota, Texas and Washington also include elements of the riparian doctrine in their water laws.

[27] For example, " '[b]eneficial use' includes but is not limited to use for domestic, municipal, recreation, wildlife, including fish, agricultural, mining, stockwatering and power purposes." ARIZ. REV. STAT. § 45-181(1) (2002). " 'Beneficial use' . . . means . . . a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreation uses . . . ." MONT. CODE ANN. § 85-2-102(2) (2002). Beneficial use is "the

(Continued on following page)

If the purpose of a water diversion were disposal of waste, such as mine drainage, there would be no end use of the water that benefits either the conveyor or society. Such waste disposal is contrary to state water law because there is no beneficial use, hence the proponent of the water transfer would not acquire the right to "use" the water.[28] Where the purpose of the diversion was to deliver water to another basin for irrigation and municipal use, however, farmers and city residents benefit from the use of the water, and the diversion/delivery would be recognized by state law.[29] In essence, the appropriation doctrine inherently does not allow the diversion of water for waste disposal purposes. Therefore, a deference to state law in this case would not lead to unregulated waste disposal.

The riparian doctrine of "reasonable use" is analogous to "beneficial use;" water may only be used for productive purposes and not for waste disposal. For example, in Florida,

> "[r]easonable-beneficial use" means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.

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use of such water as may be necessary for some useful and beneficial purpose . . . ." *State ex rel. Erickson v. McLean*, 62 N.M. 264, 273, 308 P.2d 983, 988 (1957).

[28] *See, e.g., Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132, 429 P.2d 889 (1967) ("The use of waters as an agent to expose or to carry and deposit sand, gravel and rock, is as a matter of law unreasonable within the meaning of the constitutional amendment").

[29] *See, e.g., Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996).



FLA. STAT. § 373.019(13) (2002).[30] As in a western prior appropriation state, to obtain a state permit to use water in Florida "the applicant must establish that the proposed use of water . . . [i]s a reasonable-beneficial use, . . . [w]ill not interfere with any presently existing legal use of water; and . . . [i]s consistent with the public interest." FLA. STAT. § 373.223(1) (2002). The analysis is the same under the Florida statute as it is in any western state; that is, if the purpose of the diversion is to dispose of waste, the diversion is not authorized by state water law.

A number of states can also apply a "public interest test" when evaluating a water right request so as to protect water quality. For example, in Idaho "if an applicant's appropriation of water 'will conflict with the local public interest' . . . then the Director 'may reject such application and refuse issuance of a permit therefor, . . . or may grant a permit upon conditions.'" *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 448 (1985). Similarly, Alaska "may not issue a permit unless doing so is in the public interest . . . consider[ing] the impacts of water appropriation on fish and game resources [and] public health . . . ." *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 950 (Alaska 1995). California's State Water Resources Control Board "has been granted broad authority to control and condition water use, insuring utilization consistent with the public interest . . . . The [board's] powers extend to

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[30] The New Hampshire Supreme Court similarly explained "a riparian owner has a right to the beneficial use of the water of a river or stream passing through or adjacent to his land . . . . An upstream riparian owner may divert water from its channel for any lawful use, so long as he returns it to the channel . . . in substantially the same condition as when it reached the upstream riparian owner's land." *Wisniewski v. Gemmill*, 123 N.H. 701, 465 A.2d 875 (1983).

regulation of water quality . . . ." *Envtl. Def. Fund, Inc. v. E. Bay Mun. Dist.*, 26 Cal.3d 183, 198, 605 P.2d 1, 9 (1980).

Reversal of the Eleventh Circuit decision would not lead to unregulated waste disposal practices as some may fear.

### B. State "Water Quality Law" Appropriately Addresses the Water Quality Effects of Transbasin Diversions/Deliveries.

Two essential characteristics must be protected by state water laws for a water right to have meaning: first, the actual physical quantity of water must be available at the point of diversion and, second, the quality of the water must be adequate for the beneficial use. State laws accordingly protect both quantity and quality, through the common law, by statute, and through state water quality programs.[31]

[31] The construction of water diversion facilities, whether by headgate, dam, or a combination of both, most often occurs in waters regulated not only by state law but also by section 404 of the Clean Water Act, 33 U.S.C. § 1344. Review under section 404 also triggers the need for state reviews under section 401 of the Act. *Id.* at § 1341.

The Corps cannot issue a section 404 permit without a state section 401 certification that such activity will comply with, *inter alia*, applicable state water quality standards. 33 U.S.C. § 1341(a)(1); 33 C.F.R § 325.2(b), 330.4(c) (2002). Through section 401 certification, States (or the EPA Administrator where a state lacks authority to give the certification, 33 U.S.C. § 1341(a)) may accordingly address and prevent adverse water quality impacts that could otherwise result from these activities. For example, section 401(d) allows states to impose "other limitations" to assure compliance with state water quality standards and with "any other appropriate requirement of State law . . . ." *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 713-14 (1994). The Court has upheld such limitations on the construction and subsequent operation of a diversion based on state water quality

(Continued on following page)



The states' common law regards water pollution as a nuisance and, therefore, a trespass against the complainant's right to use water. The basic premise is that water quality cannot be impaired to an extent that would prevent subsequent uses. In Colorado, "a common law theory based on the prior appropriation doctrine . . . prohibits the discharge of contaminants into streams where doing so makes the water unsuitable for an[other] appropriator's normal use of water." *In re Concerning Application for Plan for Augmentation of the City and County of Denver*, 44 P.3d 1019, 1028 (Colo. 2002).

Other states reach similar results. *See, e.g., Phillips v. Davis Timber Co., Inc.*, 468 So. 2d 72, 79 (Miss. 1985) (plaintiff "entitled to an injunction enjoining and prohibiting further PCP pollution into his lake . . . ."); *Leo v. Gen. Elec. Co.*, 145 A.D.2d 291, 538 N.Y.S.2d 844, 846 (1989) (commercial fishermen have standing to sue for nuisance fishermen and obtain an injunction to prevent water pollution); *Dingwell v. Town of Litchfield*, 4 Conn. App. 621, 496 A.2d 213 (1985) (upholding injunction against town's pollution of well); *Penn. R.R. v. Sagamore Coal Co.*, 281 Pa. 233, 238, 126 A. 386, 387 (1924) (pollution of stream creates an enjoinable nuisance); *Sharp v. 251st St. Landfill, Inc.*, 925 P.2d 546, 556 (Okla. 1996) (permanent injunction against landfill that would pollute water). The states' ability to control water use need not be trampled upon, as would be true under the Eleventh Circuit opinion, in order to protect other water users from undue harm.

standards, including designated uses, water quality criteria, and antidegradation. *Id.* at 715-16, 719.

Some states have found it appropriate to enact state water quality provisions to protect users of water allocated under state law from injury. For example, Colorado law confers the power on each municipality "to enact all ordinances and regulations necessary" to protect municipal "water from pollution." COLO. REV. STAT. § 31-15-707(1)(b) (2002). Municipal jurisdiction extends "five miles above the point" in the stream or source from which water is taken. *Id.* This statute allows municipalities to protect the quality of their water supplies independent of the Clean Water Act.[32]

The Colorado Water Quality Control Act provides general authority to regulate any "activity" that causes "the quality of any state waters to be in violation of any applicable water quality standard." COLO. REV. STAT. § 25-8-205(1)(c) (2002). The Act also contains specific regulatory authority empowering the state to protect water quality through the adoption of control regulations, analogous to NPDES permits, for discharges from the "diversion, carriage, and exchange of water from or into streams, lakes, reservoirs or conveyance structures, or storage of water in or the release of water from lakes, reservoirs, or conveyance structures."[33] COLO. REV. STAT.

[32] The Town of Crested Butte, Colo., prohibits "[a]ll non-point and point sources of pollutants caused by or associated with land use activities in the Watershed District which will result in any measurable increase in pollution over existing water quality." Crested Butte, [Colo.], ¶ 145-10(B) (2003). *See also Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

[33] Control regulations may, for example, "describe precautionary measures, both mandatory and prohibitory, that must be taken by any person . . . [who] could reasonably be expected to cause pollution of any state waters . . . or . . . be in violation of any applicable water quality standard." COLO. REV. STAT. § 25-8-205(1)(c) (2002).



§ 25-8-503(5) (2002). The state may also adopt control regulations when necessary to assure compliance with water quality standards and classifications and "to protect present and future beneficial uses" of water. COLO. REV. STAT. § 25-8-202(7)(b)(II)(A) (2002).[34] This statutory authority allows the state to control the discharge of pollutants in situations analogous to *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1277 (CA1 1996) (transfer of water containing pollutants into "relatively pristine" pond), and *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (CA9 2003) (disposal of wastewater from production of coal bed methane), while simultaneously ensuring that water rights are not impaired. COLO. REV. STAT. § 25-8-104. Thus, state laws can and do appropriately address any water quality problems potentially associated with water conveyances, while respecting water allocations. In contrast, court-mandated NPDES permitting requirements would constitute wholesale interference with transbasin deliveries of water for beneficial use under state water law.

## CONCLUSION

If water is the "life blood" of the West, then transbasin diversions/deliveries are surely the "arteries" that sustain the region's cities, towns, agriculture and industry. Such

[34] While conveyances are not subject to NPDES permitting, Colorado statute prohibits the discharge of any pollutant into a ditch or man-made conveyance for the purposes of evading NPDES permitting requirements. COLO. REV. STAT. § 25-8-101(1) (2002). Thus, a discharger could not evade permitting by discharging pollutants to a transbasin water conveyance rather than a stream.

transbasin diversions are no less important in other parts of the country, such as New York City and other eastern metropolitan areas. The Eleventh Circuit decision in *Miccosukee* runs roughshod over the states' management of their water resources. In marked contrast, the states are well suited to manage water quality impacts associated with transbasin diversions/deliveries under state law.

The decision must be reversed.

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In The
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF *AMICI CURIAE* OF THE NATIONAL WATER RESOURCES ASSOCIATION, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT, ARIZONA DEPARTMENT OF WATER RESOURCES, THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, THE WESTERN URBAN WATER COALITION, THE WESTERN COALITION OF ARID STATES, AND THE STATE WATER CONTRACTORS, IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Virtually all waters contain pollutants, often naturally occurring ones. The question that *amici* will address is as follows: whether the conveyance of waters naturally containing pollutants from one water body to another requires a National Pollutant Discharge Elimination System permit under the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*

TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 10 |
| ARGUMENT | 12 |
| I. The Eleventh Circuit Opinion is Contrary to the Federal/State Balance Governing the Use of Water | 12 |
| A. Congress and the Courts Have Historically Deferred to State Law in the Allocation of Water | 12 |
| B. NPDES Permitting of Simple Transbasin Conveyances of Water Would Impair Existing State Water Allocations | 14 |
| C. There Exists No Clear Congressional Statement of Intent Endorsing Such Interference With State Laws | 19 |
| D. The Legislative History of the Clean Water Act Demonstrates Congress' Intent Not to Interfere in State Laws Governing the Use of Water | 21 |
| E. Legitimate Water Quality Measures May Only Incidentally Affect the Use of Water | 22 |
| II. Other Provisions of the Clean Water Act Address Water Quality Impacts from the Movement of Water | 24 |
| A. Section 304(f) of the Clean Water Act Addresses the Control of Pollution from Changes in the Movement, Flow or Circulation of Waters Caused by Dams, Channels, Causeways, or Flow Diversion Facilities | 25 |




TABLE OF CONTENTS – Continued


| | Page |
|---|---|
| B. Section 319 of the Clean Water Act Requires the States to Develop Management Programs for Controlling Pollution Added by Nonpoint Sources | 26 |
| C. Section 208 of the Clean Water Act Further Requires States or Local Governments to Prepare Areawide Waste Treatment Management Plans to Control Pollution from Major Categories of Nonpoint Sources | 27 |
| CONCLUSION | 28 |

## TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 376 U.S. 340 (1964) ..... 4

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) ..... 13, 20

California v. United States, 438 U.S. 645 (1978) ..... 12

Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305 (CA9 1993) ..... 15

Gregory v. Ashcroft, 501 U.S. 452 (1991) ..... 20

Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364 (CA11 2002) ..... 1, 14, 16, 24

Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (CA6 1988) ..... 25

Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (CADC 1982) ..... 11, 15, 24, 25, 27

PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994) ..... 18, 23

Sierra Club v. Meiburg, 296 F.3d 1021 (CA11 2002) ..... 26

Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159 (2001) ..... 19, 20, 21, 28

United States v. Lopez, 514 U.S. 549 (1995) ..... 20

STATUTES

33 U.S.C. § 1251 ..... 13, 19, 21

33 U.S.C. § 1288 ..... 28

33 U.S.C. § 1313 ..... 18, 19

33 U.S.C. § 1314 ..... 25



## TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. §§ 1319, 1365 ..... 2

33 U.S.C. § 1329 ..... 26

33 U.S.C. § 1341 ..... 23

33 U.S.C. § 1342 ..... 10, 19, 23

33 U.S.C. § 1370 ..... 13

CALIFORNIA WATER CODE § 7075 (2002) ..... 10

IDAHO CODE § 42-105(1) (2003) ..... 10

OTHER AUTHORITIES

Corbridge and Rice, VRANESH'S COLORADO WATER LAW, § 1.2 (1999) ..... 14

EPA, QUALITY CRITERIA FOR WATER 1983 (1986) ..... 16

EPA, WATER QUALITY STANDARDS HANDBOOK: SECOND EDITION (1994) ..... 18

EPA, WATER QUALITY STANDARDS HANDBOOK (1987) ..... 27

H. R. REP. No. 92-911 (1972) ..... 25

S. CONF. REP. No. 95 (1977) ..... 21

S. DEB.: August 4, 1977 ..... 21

S. DEB.: December 15, 1977 ..... 22

REGULATIONS

40 C.F.R. § 122.44 ..... 15, 16, 17

40 C.F.R. § 130.2 ..... 26

TABLE OF AUTHORITIES – Continued

Page

40 C.F.R. § 130.7 .....18

40 C.F.R. § 131.12 .....18



## INTEREST OF *AMICI CURIAE*

*Amici curiae*, the National Water Resources Association, the Metropolitan Water District of Southern California, the Central Arizona Water Conservation District, the Arizona Department of Water Resources, the Association of California Water Agencies, the Western Coalition of Arid States, the Western Urban Water Coalition, and the State Water Contractors submit this brief in support of Petitioner South Florida Water Management District seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (CA11 2002).[1] In *Miccosukee*, the Eleventh Circuit held that a National Pollutant Discharge Elimination System ("NPDES") permit is required when water, which naturally contains pollutants, is diverted and conveyed into another distinct body of navigable water. *Id.* at 1368-69.

In the West, diversion of water in the spring as mountain snows melt, its transport through tunnels, canals, pipelines and natural stream systems to the place of need, and its storage in reservoirs are all essential steps in meeting water supply requirements.[2] To the extent

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. The parties' counsel have consented to the filing of this brief and letters reflecting that consent are submitted to the clerk's office with this brief.

[2] Although transbasin diversions are primarily for the benefit of the diverter, water rights in the receiving basin also benefit from transbasin return flows. In many cases, these return flows satisfy senior water rights, allowing "junior" in-basin diverters to remain in priority and take additional water.

these waters, which contain a particular set of constituents, are conveyed from one basin of water into another basin with different natural constituents, a "regulated" discharge of pollutants would be found to exist under the *Miccosukee* decision. In such circumstances, the operators of such transbasin conveyances would find it necessary to either significantly modify their operations, build and operate expensive water treatment systems, or curtail their operations altogether.[3] This would be the case even though they did nothing to "add" pollutants to the diverted waters.

The National Water Resources Association ("NWRA") is a voluntary organization of state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the Reclamation States of the Western United States. Its members range from the Metropolitan Water District of Southern California, which serves most of California's south coast, to Dirk Parkinson, a member of the Idaho Water Users Association and the owner of the McCormick Rowe Ditch in St. Anthony, Idaho, which is

[3] The Clean Water Act also provides its own remedies, including civil and criminal fines for permit violations, and "citizen suits" that allow individuals (including those from affected states) to sue for injunctions to enforce the statute. 33 U.S.C. §§ 1319, 1365.



used to irrigate 240 acres of farmland.[4] NWRA members directly engage in, or rely on, water from innumerable transbasin water diversion projects.[5] If these diversion and storage activities were effectively halted or became prohibitively expensive to operate due to NPDES permitting conditions, NWRA members would be unable to meet essential domestic, agricultural and industrial water demands.

The Metropolitan Water District of Southern California ("MWD") is a public corporation that, through its 26 member public agencies, provides water to 18 million people in Southern California. MWD owns and operates an extensive system of transbasin aqueducts, canals and water conveyance structures that are essential to supply the water needs of Southern California, including the

[4] Other NWRA members include the Arizona Cattlemen's Association (AZ), the Central Arizona Water Conservation District (AZ), Coachella Valley Water District (CA), Glen-Colusa Irrigation District (CA), Imperial Irrigation District (CA), East Bay Municipal Utility District (CA), San Diego County Water Authority (CA), Colorado River Water Conservation District (CO), City of Fort Collins (CO), Montana Water Users Association (MT), Garrison Diversion Conservation District (ND), Middle Rio Grande Conservancy District (NM), Las Vegas Valley Water District (NV), Talent Irrigation District (OR), Brazos River Authority (TX), Provo River Water Users Association (UT), and Methow Valley Irrigation District (WA).

[5] NWRA has maintained a close working relationship with the U.S. Bureau of Reclamation, as many of its members are the operators or beneficiaries of Reclamation water projects, including projects with significant transbasin components. *See, e.g.*, Colorado's Frying-Pan Arkansas Project, California's Friant-Kern Canal (part of Central Valley Project), and New Mexico's San Juan-Chama Project.

Colorado River Aqueduct, which can draw in excess of one million acre-feet[6] per year.

The Central Arizona Water Conservation District ("CAWCD") is a multi-county water conservation district responsible for managing Arizona's largest renewable water supply – approximately 1.5 million acre-feet of Colorado River water. CAWCD operates the Central Arizona Project ("CAP"), a 336-mile long transbasin conveyance system of pumping plants, concrete-lined canals, inverted siphons, tunnels and pipelines, constructed for the purpose of transporting water from Lake Havasu on the Colorado River to central and southern Arizona.[7] CAWCD's service area encompasses 80 percent of Arizona's water users and taxpayers, including the Phoenix and Tucson metropolitan areas.

The Arizona Department of Water Resources is responsible for the comprehensive management of the waters of the State of Arizona throughout the state, including surface water, groundwater and effluent. The Department is also the successor to the state agency that entered into the 1944 Contract for delivery of Colorado

[6] An acre-foot is the amount of water needed to cover an acre to a depth of one foot, or 325,850 gallons. This is approximately the amount of water used by a family of four in a year.

[7] In 1964, the Court issued a decree that confirmed Arizona's right to 2.8 million acre-feet of mainstream Colorado River water annually. *Arizona v. California*, 376 U.S. 340 (1964) (the "1964 Decree"). Although Arizona's entitlement to water from the Colorado River was confirmed by the 1964 Decree, the state had no practical means of using all of that water because it lacked a water delivery system capable of transporting water from the Colorado River to the more populated regions of central Arizona until completion of the CAP.



River water to Arizona pursuant to interstate compacts, Acts of Congress, and U.S. Supreme Court decisions, and is authorized to prosecute and defend all rights, claims and privileges of the state respecting interstate streams.

The Western Coalition of Arid States ("WESTCAS") is an advocate for laws, regulations and policies that ensure sustainable supplies of water for the Arid West and protect public health and the environment. WESTCAS was formed over ten years ago in order to appropriately address water quality issues in an area of the country where precipitation is oftentimes less than ten inches per year and, as a consequence, unique arid ecosystems are the norm. Many WESTCAS members[8] depend upon transbasin water diversions both to meet municipal water supply requirements and to sustain, by virtue of water transport or wastewater discharge, riparian ecosystems that have developed in ephemeral or intermittent stream systems.

The Western Urban Water Coalition ("WUWC") is an association of the largest municipal water utilities in the Western United States. The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. WUWC members[9] own

[8] WESTCAS members include numerous water and wastewater agencies, such as the City of Phoenix (AZ), Tucson Water (AZ), the Salt River Project (AZ), Eastern Municipal Water District (CA), Los Angeles County Sanitation District (CA), the Sweetwater Authority (CA), Denver Metro Wastewater District (CO), Clark County Water Reclamation District (NV), the cities of Albuquerque and Santa Fe (NM), and El Paso Water Utilities (TX).

[9] WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Utah and Washington, including those residing within the cities of Phoenix,

(Continued on following page)

and operate water management, water supply and hydroelectric projects. These projects consist of water conduits and reservoirs, including transbasin water diversion facilities. The continued, unimpeded operation of these facilities is essential to the continued ability of WUWC members to serve the water needs of the major population centers of the Western States.

The Association of California Water Agencies ("ACWA") is a voluntary, statewide non-profit association comprised of 488 public water agencies that was founded in 1910. Together, these agencies are responsible for more than 90 percent of the water delivered in the state. In addition to public agency members, ACWA also includes 28 affiliate members, consisting of mutual water companies and other non-public, non-profit water related agencies, and 302 associate members including firms and corporations in the law and engineering fields with an interest in California water issues. ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner.

The State Water Contractors ("SWC") represents 27 of the 29 public water agencies operating within California who contract with the California Department of Water Resources for water supplies from the State Water Project ("SWP").[10] The SWP diverts water from the

Denver, San Diego, Los Angeles, San Francisco, Oakland, Las Vegas, Salt Lake City, Tucson and Seattle.

[10] The agencies that comprise the State Contractors are the following: Alameda County Flood Control and Water Conservation

(Continued on following page)



Sacramento-San Joaquin Delta through the California Aqueduct for distribution to the San Joaquin Valley and delivery over the Tehachapi Mountains into southern California. The Project supplies water for drinking, commercial, industrial and agricultural purposes to public water agencies, encompassing a population of over 22 million Californians – about two-thirds of the State's population – and over 750,000 acres of farm land throughout the San Francisco Bay area, the Central Valley, and Southern California. The SWP constitutes a significant portion of the supplies available to SWC members. As a result, the SWC is very concerned with matters affecting the SWP, the Sacramento-San Joaquin Delta, and tributaries to the Delta.

Transbasin conveyances may be as mundane as the diversion of water from a river into a nearby (but hydrologically separate) stream bed for delivery to a nearby town or field, or as massive as the transport of the vast

District, Zone 7, Alameda County Water District, Antelope Valley-East Kern Water Agency, Casitas Municipal Water District, Castaic Lake Water Agency, Central Coast Water Authority, City of Yuba City, Coachella Valley Water District, County of Kings, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Dudley Ridge Water District, Empire-West Side Irrigation District, Kern County Water Agency, Littlerock Creek Irrigation District, Metropolitan Water District of Southern California, Mojave Water Agency, Napa County Flood Control and Water Conservation District, Oak Flat Water District, Palmdale Water District, San Bernardino Valley Municipal Water District, San Gabriel Valley Municipal Water District, San Gorgonio Pass Water Agency, San Luis Obispo County Flood Control and Water Conservation District, Santa Clara Valley Water District, Solano County Water Agency, and Tulare Lake Basin Water Storage District.

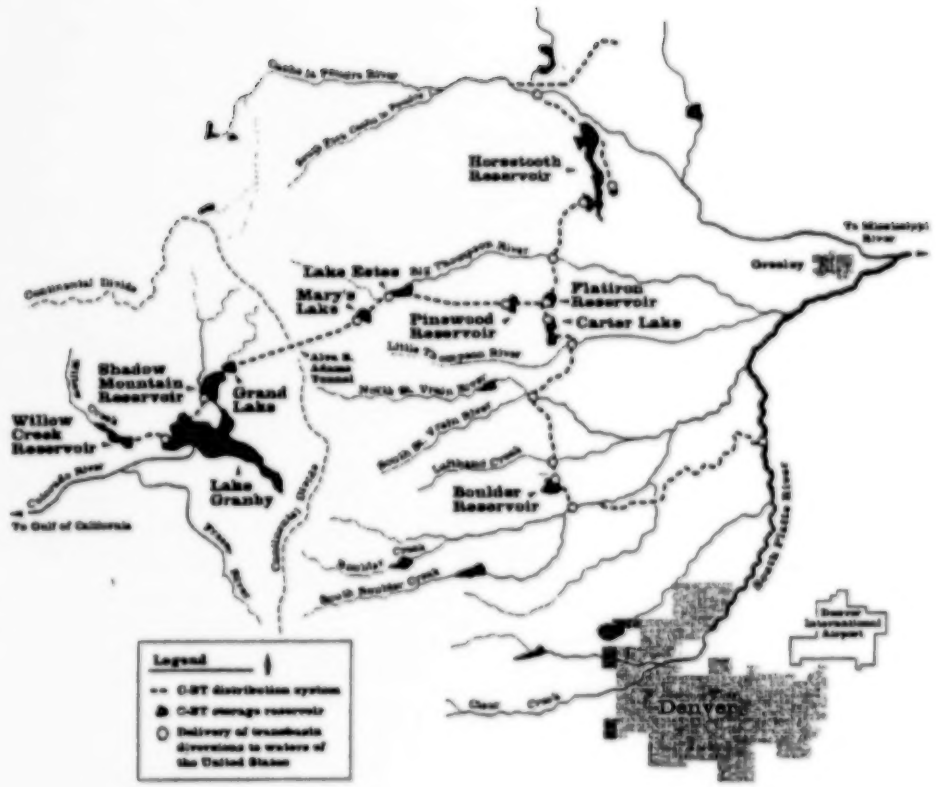
waters of Northern California through the San Francisco Delta. By way of example, in the Upper Colorado River Basin alone there are at least 36 major transbasin conveyances that move approximately 700,000 acre-feet of water per year from the basin of origin for use in another basin. Included within these diversions are the waterworks of the City of Colorado Springs, whose transbasin diversions in 2001 totaled approximately 75,000 acre-feet, representing almost eighty (80) percent of the City's total water supply, and the City of Denver's Roberts and Moffat Tunnels, which convey in excess of 200,000 acre-feet annually for municipal use, thereby meeting forty-five (45) percent of the Denver municipal system demand.

The Colorado-Big Thompson Project ("C-BT"), operated by the Northern Colorado Water Conservancy District in Colorado, conveys an average of 228,000 acre-feet per year through the Rocky Mountains and the Continental Divide to irrigate over 600,000 acres.[11] C-BT diverts water from four source lakes, reservoirs and streams, and conveys that water with gravity and three pump stations through two tunnels and nine canals into 17 different streams, rivers, lakes and reservoirs, as illustrated below.[12]

[11] The Municipal Subdistrict of the Northern Colorado Water Conservancy District, an NWRA member, also operates the Windy Gap transbasin diversion project that is designed to provide approximately 48,000 acre-feet of water per year on average for municipal/industrial use.

[12] Although C-BT is the largest transbasin diversion in Colorado, it is not unusually complex in comparison to other western systems.






Other examples of transbasin diversions include the Provo River Project in Utah, which imports over 100,000 acre-feet per year for use in the Salt Lake City metropolitan area, and New Mexico's San Juan-Chama Project, which diverts from the San Juan River Basin to the Rio Grande River Basin, supplying water to Santa Fe, Albuquerque, and various Indian tribes. Similarly, the Bureau of Reclamation's Central (California) Valley Project diverts, stores and transfers Sacramento River water to nearly a million acres of fertile land on the west side of the San Joaquin Valley and replaces San Joaquin River water diverted through the Madera and Friant-Kern canals to more than a million acres of mainly perennial crops on the

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east side of the San Joaquin Valley. Although the largest conveyance facilities in California are often the focus of the Court's attention, the Eleventh Circuit's rationale would cripple the literally thousands of small conveyance systems in the state whose operators have relied on California law[13] to use natural channels to convey developed waters for over a century.

## SUMMARY OF ARGUMENT

The ability to freely divert, transport, store and use water in accordance with state law and state-established water allocations is vital to the well-being of the West. Water users must be able to move water from one river basin or sub-basin to another, utilizing pipelines, canals, ditches and natural stream systems to meet municipal, agricultural and industrial water demands. Requiring each transbasin conveyance to operate under an NPDES permit under section 402 of the Clean Water Act, 33 U.S.C. § 1342, would reduce or end many diversions because permitting requirements could not be met.

Both Congress and this Court have historically deferred to the states in matters of water use, and have assiduously avoided impinging upon state and local

[13] CALIFORNIA WATER CODE § 7075 (2002) provides "[w]ater which has been appropriated may be turned into the channel of another stream, mingled with its water, and then reclaimed. . . ." *See also, e.g.*, IDAHO CODE § 42-105(1) (2003) ("The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed. . . .").



authority to allocate water. The Clean Water Act does not contain any "plain statement" indicating a contrary intent. Instead, the plain language of the Act expresses Congress' continued intent to honor state and local decision-making in the management of water resources. Recognition of that intent is particularly important where, as here, application of the regulatory mechanism of the Clean Water Act would result in direct federal control of, not merely an incidental impact upon, state water allocations and state-established water rights.

Requiring NPDES permits for transbasin conveyances of water creates an unnecessary layer of federal control that is antithetical to the purposeful and continued deference by Congress to state water law. Congress included provisions in the Clean Water Act to ensure that water quality impacts from water involved in transbasin conveyances are addressed at the state level. These provisions appropriately allow the states to manage the quality of these waters in concert with state water allocation principles.

As the Court of Appeals for the District of Columbia observed, "[r]ead as a whole, the Clean Water Act shows not only Congress' determined effort to clean up our polluted lakes and rivers, but also its practical recognition of the economic, technological, and political limits on total elimination of all pollution from all sources." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178 (CADC 1982). Simply stated, it is not practical for transbasin conveyances to operate under NPDES permitting requirements.

The language of the Clean Water Act does not support the premise that the mere movement of water in order to meet critical water needs, in the absence of the addition of

any pollutants by the water conveyor, constitutes a regulated point source discharge. The water quality impacts associated with such water diversion activities are most appropriately addressed at the state level through the nonpoint source programs of the Clean Water Act.

## ARGUMENT

### I. The Eleventh Circuit Opinion is Contrary to the Federal/State Balance Governing the Use of Water.

The Eleventh Circuit opinion ignores historical federal deference to the states in matters affecting the allocation of water. Not only does the Clean Water Act lack a clear statement of Congressional intent to intrude upon such traditional state authority, it contains unequivocal language reflecting Congress' desire to respect state water laws. This Congressional intent is well supported by the legislative history.

#### A. Congress and the Courts Have Historically Deferred to State Law in the Allocation of Water.

As this Court observed in *California v. United States*, 438 U.S. 645, 653 (1978):

> The history of the relationship between the Federal Government and the states in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of *purposeful and continued deference to state water law* by Congress.



(emphasis added). *See also, e.g., California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 162, 164 (1935) (the Desert Lands Act severed all waters from the public domain and reserved such water for use under the laws of the states). This principle of "purposeful and continued deference to state water law" is present throughout the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, including congressional statements of intent in sections 101(a), 101(g) and 510, as well as in specific programmatic elements in sections 208, 304 and 319, as discussed below.

Of greatest significance to this case, section 101(g) of the Clean Water Act explicitly provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

33 U.S.C. § 1251(g). Section 510 reiterates this federal deference to state law in matters implicating water use:

> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370.

Thus, Congress was careful in enacting the Clean Water Act not to impair the states' ability to allocate water as they deem appropriate.[14] More importantly for this case, once those flows are allocated, Congress did not intend that the Clean Water Act be used to impair their placement to beneficial use. In fact, Congress intended precisely the opposite. Federal regulation of the "movement" of water through the requirement of an NPDES permit, as mandated by *Miccosukee*, would interfere with this well-established balance between federal and state interests. Moreover, this interference would be direct and immediate, not just incidental. Federal control of transbasin conveyances (through the NPDES permit process) goes to the heart of state water allocation laws and would eviscerate state-granted water rights that are the product of those laws.

### B. NPDES Permitting of Simple Transbasin Conveyances of Water Would Impair Existing State Water Allocations.

The Eleventh Circuit's opinion requires *every* transbasin conveyance to waters of the United States to obtain an NPDES permit. This is true regardless of the chemical makeup of the water being transferred. Multiple permits would likely be necessary for a project, which, like the

[14] In the West, some form of the "prior appropriation" doctrine is the predominant method of water allocation. *See* Corbridge and Rice, VRANESH'S COLORADO WATER LAW, § 1.2 (1999). Under this doctrine, users divert water out of natural channels, convey that water to the place of use, and then put the water to beneficial use. The place of use is often in an entirely different river basin, and may be hundreds of miles from the point of diversion.



Colorado-Big Thompson Project, diverts water and then conveys it into and out of multiple natural waterways to the place of use.[15]

The problem with the reasoning of the Eleventh Circuit is apparent in an earlier decision of the Ninth Circuit, which concluded "[t]he [Clean Water] Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the *Act categorically prohibits any discharge of pollutants from a point source without a permit.*" *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (CA9 1993) (emphasis added). *But see, Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (CADC 1982) ("for an addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into the navigable water from the outside world"). Since all waters *naturally* contain regulated constituents ("pollutants"), all water conveyors would be subject to the potentially onerous mandates of the NPDES permitting process. More importantly, a very real possibility exists that the transfer of water may be prohibited or limited simply due to the presence of naturally occurring constituents.[16]

[15] *See* discussion and schematic diagram of the C-BT project, *supra* at p. 9.

[16] Assuming that a permit would be necessary for mere water transfers, EPA regulations mandate conditions in NPDES permits that require dischargers to "control all pollutants or pollutant parameters . . . which . . . are or may be discharged at a level which *will cause, have* the *reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria* for water quality." 40 C.F.R. § 122.44(d)(1)(i) (emphasis added). Thus, if a transbasin water conveyance merely has "the potential to cause . . . an

(Continued on following page)

For example, runoff from snowmelt[17] and thunderstorms may contain elevated levels of total suspended solids (particles of soil and sediment, i.e., mud), and turbidity (i.e., muddy water) as a result of erosion caused by snow melt and high flows. Although suspended solids carried into a stream or open ditch will eventually settle out,[18] their temporary presence could cause an excursion above water quality standards triggering regulatory consequences. Additionally, the source water (the Colorado River, for example) may be *naturally* high in total dissolved solids (salts) as a result of its passage through certain types of soils and inflows from saline hot springs. In either event, an NPDES permit applied to a transbasin conveyance would have to contain appropriate conditions

excursion above any State water quality standard," its NPDES permit, as required by *Miccosukee*, must contain a condition requiring dischargers to control all contributing pollutants or pollutant parameters. EPA has established over 94 water quality criteria – from arsenic to temperature, turbidity, and zinc – for waters of the United States. EPA, QUALITY CRITERIA FOR WATER 1983 (1986). It would be a rare situation where the source waterbody did not contain concentrations of at least one of these constituents above the ambient concentrations of the receiving water during a significant part of the year.

EPA regulations also require effluent limits on permits where there is "the reasonable potential to cause, or contribute" to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant. . . ." 40 C.F.R. § 122.44(d)(1)(iii). The effect of this requirement would be to restrict transbasin conveyances whenever the source waters contained any constituent at a level above a water quality standard in the receiving waterbody.

[17] Up to 80 percent of the precipitation in the western states falls as snow.

[18] It is important to understand that it is physically impossible to turn diversions on and off instantly in response to runoff conditions. It can also take many days and/or miles for a muddied waterway to clear.



limiting the quantity of *natural* pollutants delivered to the receiving water body. *See* 40 C.F.R. § 122.44(d)(1)(i).

If a permit for a transbasin conveyance contained limits on *natural* pollutants, the diverter would have to either construct a treatment facility or limit the volume of water diverted. Either option would interfere with the diversion, conveyance and use of water. Treatment is problematic given the location of many transbasin diversions in high mountain or low desert areas[19] and the volume of water involved,[20] making it economically and/or technically impossible.[21] Instead, diverters would be forced to curtail their diversions. Because diverters would bypass water downstream to which they were entitled, they would relinquish a part of their state allocated water whenever they curtailed their diversions to meet NPDES permit conditions. Similarly, if diversions were made from tidally influenced estuaries, as they are from the Sacramento-San Joaquin Delta in California, either tidal barriers or abbreviated pumping patterns would be necessary to avoid the conveyance of salts to higher quality waters. In short, a

[19] The Homestake Tunnel, owned by the cities of Colorado Springs and Aurora, Colo., lies above 10,000 feet, traversing the Continental Divide beneath the Holy Cross Wilderness Area. The Metropolitan Water District's Colorado Aqueduct traverses the Mojave Desert on its journey from the Colorado River to Los Angeles.

[20] The California Aqueduct moves over three million acre-feet per year (1,000 million gallons). The Central Arizona Project moves over 1.5 million acre-feet per year.

[21] While settling basins can remove suspended solids, land may no longer be available near the mouths of ditches and canals constructed more than 100 years ago. And although reverse osmosis is a process that can remove dissolved solids, it is energy intensive and creates large volumes of waste brines, which entail difficult and costly disposal.

serious unintended consequence of requiring NPDES permits for transbasin conveyances would be the reduction of water supplies for municipal, agricultural and industrial uses in an already water-short region of the United States.

By way of further explication, if transbasin water conveyances constituted the addition of pollutants, such water movements would be subject to the total maximum daily load (TMDL) provisions of the Clean Water Act, 33 U.S.C. § 1313(d),[22] and federal antidegradation regulations, 33 U.S.C. § 1313(d)(4)(B).[23] In the case of a TMDL, if the waters being introduced into the basin contain a constituent (total suspended solids, for example) that

[22] TMDL provisions apply to "areas with insufficient controls" to meet water quality standards with effluent limitations alone. 33 U.S.C. § 1313(d). A TMDL defines the specified maximum amount of a pollutant that can be discharged ("loaded") into the water from all combined sources while meeting water quality standards. 40 C.F.R. § 130.7. The TMDL is then allocated among the sources so that water quality standards can be achieved. Each point source receives a specific waste load allocation, which is implemented through a section 402 discharge permit. *Id.*

[23] EPA has promulgated regulations implementing section 303's antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require states to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy. . . ." 40 C.F.R. § 131.12 (2003). "These 'implementation methods shall, at a minimum, be consistent with the . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.'" *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 718 (1994) (quoting 40 C.F.R. § 131.12). Issuance of an NPDES permit may trigger antidegradation analysis. EPA, WATER QUALITY STANDARDS HANDBOOK: SECOND EDITION (1994). "EPA believes that its antidegradation policy should be interpreted on a pollutant-by-pollutant and waterbody-by-waterbody basis." *Id.* at 4-8.



exceeds standards in the receiving waters, the diverter would receive a "load allocation" under the TMDL regulatory requirements. 33 U.S.C. § 1313(d). In many cases, the only practical way to curtail so-called improper pollutant loadings would be to reduce the amount of the diversion. If antidegradation review is triggered, dischargers cannot lower existing water quality absent a "necessity" determination, which would include an alternatives analysis for the diversion activity. 40 C.F.R. § 131.12(2). Again, this may result in the abrogation of a portion of a state-allocated water right in contravention of § 101(g), 33 U.S.C. § 1251(g).

In sum, the imposition of NPDES permitting requirements would directly and immediately interfere with the transbasin conveyance of water allocated pursuant to state law and reduce water available for beneficial use. It would upend the settled expectations that have led to vast water infrastructure investments that literally sustain the West. Such a dramatic impact upon state and local water supplies could not have been within the contemplation of Congress when it enacted the NPDES point source permit requirements, 33 U.S.C. § 1342; indeed, Congress' enactment of section 101(g) of the Act demonstrates that it was *not*.

### C. There Exists No Clear Congressional Statement of Intent Endorsing Such Interference with State Laws.

Land and water use is traditionally and primarily a state prerogative. *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). Requiring NPDES permits for mere *water collection and delivery activities* would intrude upon

matters which are, as discussed above, "subject to the plenary control of the designated States." *California Oregon Power Co.*, 295 U.S. at 164. Under the Eleventh Circuit's opinion, this unwarranted intrusion on state sovereignty would occur in the absence of any clear directive from Congress that it intended this type of federal interference with the ability of states to control and manage their water resources.[24] Without such a "clear indication" the Eleventh Circuit opinion cannot stand. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). As this Court recently reiterated in *SWANCC*, where a statutory interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly convey its intent. *SWANCC*, at 173. Not only does the Clean Water Act lack a clear message of Congress' intent to alter the federal-state framework, the opening provision of the Act is explicitly to the contrary, as this court recently recognized:

> Congress passed the CWA for the stated purpose of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In so doing, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

*SWANCC*, at 166-67, *quoting*, 33 U.S.C. § 1251(b). In short, Congress intended to honor traditional federal deference to both state water law and individual water rights allocated thereunder.

[24] It should not be forgotten that the owners and operators of the water systems are not adding pollutants to any waters prior to the water transport – they are simply moving the natural waters from one waterbody to another.



### D. The Legislative History of the Clean Water Act Demonstrates Congress' Intent Not to Interfere in State Laws Governing the Use of Water.

Congress added Section 101(g), 33 U.S.C. § 1251(g), to the Clean Water Act in 1977 to (1) reaffirm the long-standing primacy of the states over water allocation, (2) protect water rights established by the states, and (3) direct federal agencies to cooperate with the states to develop pollution control programs that operate in concert with state water allocation programs. S. CONF. REP. No. 95, *reprinted in* 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress) Ser. No. 95-14, pp. 186, 236 (1978) (hereinafter "1977 LEGISLATIVE HISTORY"). That Congress found it necessary to add section 101(g) after just five years to clarify an existing provision of the Act (section 510) underscores how serious it was about honoring state authority over water use. *Id.* at 531-32.

Senators Wallop and Hart co-sponsored the Senate floor amendment that became Section 101(g) in conference. S. DEB.: August 4, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY, at 1030. Senator Wallop, a conferee,

explained to the Senate that Section 101(g) of the conference substitute "speaks only – but significantly – to the rights of States to allocate quantities of their water and to determine priority uses." S. DEB.: December 15, 1977, *reprinted in* 1977 LEGISLATIVE HISTORY, at 532. Senator Wallop emphasized:

> The amendment simply states that it's the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superceded, abrogated, or otherwise impaired by the Act. It also states that it is the further policy of Congress that *nothing in this act will be construed for the purpose of superceding or abrogating rights to quantities of water which have been established by the States.*

1977 LEGISLATIVE HISTORY, at 532 (emphasis added).

### E. Legitimate Water Quality Measures May Only Incidentally Affect the Use of Water.

Senator Wallop emphasized that the purpose of section 101(g) was to protect state water rights creation and administration from "[f]ederal land use planning," while at the same time to allow "[l]egitimate water quality measures" that may have "some effect on the method of water usage" and "may *incidentally affect* the use of water under an individual water right." 1977 LEGISLATIVE HISTORY, at 532 (emphasis added). Citing this legislative history, the Court addressed *state authority* under section



401, 33 U.S.C. § 1341,[25] to limit diversions by a hydropower project that proposed a minimum stream flow deemed inadequate by the State of Washington. *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994). The Court reasoned that while "[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of [State] water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *Id.* at 720. The Court then held "that the State may include minimum stream flow requirements in a [state water quality] certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard." *Id.* at 723.

In what was at bottom a water allocation dispute between the developer and the state, the Court held that the *state* could impose a limitation – a minimum stream flow – on a state-issued water right. That this was only an *incidental effect* on the individual water right under the Clean Water Act is because neither the Court nor the Act mandated the result, which was reached by the state under section 401. Indeed, the Court did not, and in light of section 101(g) could not, endorse the use of the Clean

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[25] Section 401 certification is required for a federal license or permit to conduct any activity that will discharge into navigable waters. 33 U.S.C. § 1341(a)(1). Notably, state certification under section 401 is *not* subject to EPA oversight, unlike section 402 NPDES permitting. *Compare* 33 U.S.C. § 1341 *with* § 1342(d). This embodies congressional deference to the states in situations likely to involve the use of water allocated pursuant to state law.

Water Act to deprive a water user of the ability to use water allocated pursuant to state water law.

The holding of *Miccosukee* threatens considerably more than incidental effects on state water allocations; it threatens wholesale derogation of state systems of water allocation and the abrogation of state recognized water rights. Rather than operating pursuant to state water law, transbasin diverters would have to forgo some diversions in order to avoid conveying *naturally* occurring pollutants into receiving water bodies. Depriving a water right of one or more of its essential elements – its source of supply, priority, quantity, or beneficial use – is not an "incidental effect," but goes to the heart of the right itself. In short, the real effect of *Miccosukee* is not incidental, it is a unilateral federal reallocation of water in derogation of state water laws.

## II. Other Provisions of the Clean Water Act Address Water Quality Impacts from the Movement of Water.

EPA has recognized that pollution associated with dams and diversions "may not be amenable to the nationally uniform controls contemplated by section 402 because pollution problems are highly site-specific. . . ." *Gorsuch*, 693 F.2d at 177 n.62. In fact, Congress anticipated this problem of attempting to apply nationally uniform controls to the movement of water when it enacted the Clean Water Act. Rather than attempt to use the NPDES program, Congress structured the Act to give states flexibility in matters likely to affect the exercise of water rights through a program of non-point source controls.



### A. Section 304(f) of the Clean Water Act Addresses the Control of Pollution from Changes in the Movement, Flow or Circulation of Waters Caused by Dams, Channels, Causeways, or Flow Diversion Facilities.

Section 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), of the Clean Water Act provides that the EPA shall issue information on

> processes, procedures, and methods to control pollution resulting from . . . *changes in the movement, flow, or circulation* of any navigable waters or ground waters, including changes caused by the construction of *dams*, levees, channels, causeways, or *flow diversion facilities*.

*Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 587 (CA6 1988) (quoting 33 U.S.C. § 1314(f)(2)(F)) (emphasis added). According to the Sixth Circuit, this language "supports the District of Columbia Circuit's view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the nonpoint source category of pollution." *Consumers Power*, at 588 (citing *Gorsuch*, at 177.) *See also* H. R. REP. No. 92-911, *reprinted in* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Printed for the use of the Committee on Public Works) Ser. No. 93-1, p. 796 (1973). Congress gave the states specific tools in the Clean Water Act to address nonpoint sources and to control "pollution resulting from . . . changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F).

### B. Section 319 of the Clean Water Act Requires the States to Develop Management Programs for Controlling Pollution Added by Nonpoint Sources.

Along with the provisions of Section 304(f), Section 319 of the Clean Water Act "imposes on the states planning responsibilities, including the preparation of a nonpoint source management plan, commonly referred to as the § 319 report." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1027 (CA11 2002). In this report, a state[26] must identify waters which can reasonably meet water quality standards only through additional action to control nonpoint source pollution, and identify the categories, subcategories and particular sources of such pollution. 33 U.S.C. § 1329(a)(1). States[27] must also prepare a management plan that identifies "best management practices[28] and measures," i.e., implementation programs, to reduce pollutant loading, and a schedule of annual implementation milestones. *Id.* at § 1329(b). EPA provides grants to the states to implement such "319 management plans." In short, rather than mandate section 402 point source permit controls on the diversion and conveyance of water pursuant to state water law, Congress chose to utilize

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[26] In the absence of state action, EPA shall prepare the report. 33 U.S.C. § 1329(d)(3).

[27] A local water quality agency may prepare the management plan with the consent of the state where EPA has prepared the § 319 report. 33 U.S.C. § 1329(e).

[28] Best management practices are methods and practices, including structural and nonstructural controls and operation and maintenance procedures applied before, during or after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters. *See, e.g.*, 40 C.F.R. § 130.2(m).



section 319 to foster the preparation and implementation of comprehensive *state* programs to control nonpoint sources of pollution, including dams and flow diversion facilities. *See* EPA, WATER QUALITY STANDARDS HANDBOOK, CH.2, Nonpoint Source Controls and Water Quality Standards (1987) (While the Clean Water Act does not establish a Federal regulatory program for nonpoint sources, it clearly intended that proper installation of state approved best management practices will achieve water quality standards). The states have ongoing "319 programs" that appropriately address nonpoint sources in a manner consistent with state water law.

### C. Section 208 of the Clean Water Act Further Requires States or Local Governments to Prepare Areawide Waste Treatment Management Plans to Control Pollution from Major Categories of Nonpoint Sources.

According to the Court of Appeals for the District of Columbia, state and local control over the use of water resources represents sound public policy:

> [D]ams are a major component of state water management, providing irrigation, drinking water, flood protection, etc. In light of these complexities, which the NPDES program was not designed to handle, it may well be that [§ 208] state areawide water quality plans are the better regulatory tool.

*Gorsuch*, 693 F.2d at 182.

Section 208 requires states to identify geographic areas with substantial water quality control problems and to designate "208 planning agencies" to prepare areawide

wastewater treatment management plans. 33 U.S.C. § 1288(a)(2). So-called "208 plans" must include processes to identify agricultural, silvicultural, mining, and construction sources of pollution, and "procedures and methods (*including land use requirements*[29])" to control such sources. *Id.* at § 1288(b)(2) (emphasis added).[30] Areawide plans thus identify priority water quality problems, and recommend control measures. In the context of this case, areawide plans can address not only pollution problems in the receiving waters from transbasin conveyances, but also the control of water quality problems in source waters before it is diverted. Areawide plans thus provide another appropriate tool for states to use to control nonpoint sources of pollution. The states have long had approved areawide plans in place to address nonpoint sources of pollution.

## CONCLUSION

Few issues are more critical to states, municipalities, conservancy and conservation districts, canal and ditch companies, individual farmers, ranchers and residents in the West than their continued ability to use scarce water resources when and where needed. This necessarily involves the diversion and transbasin conveyance of water

[29] Like water allocation decisions, land use regulations are primarily a state prerogative, most appropriately handled by the states and local governments when necessary to control water pollution. *SWANCC*, 531 U.S. at 174.

[30] EPA makes grants to the states to develop and operate such plans. 33 U.S.C. § 1288(f).



through manmade pipelines, tunnels and canals, and natural water bodies. Such water management activities have always been, and must remain, a state prerogative.

The Eleventh Circuit's conclusion that the movement of *natural* waters from one stream or river to another constitutes a regulated "addition" of pollutants is at odds with federal deference to state water laws and the Clean Water Act. The movement of water containing pollutants from one watercourse to another is not a point source discharge subject to permitting, but is properly dealt with by the states pursuant to the nonpoint source provisons of the Act.

There is no doubt that the Eleventh Circuit's decision would significantly interfere with the federal/state balance relative to the use of water, and reduce water supplies in the arid west. *Amici* therefore urge the Court to reverse the decision.

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Case No. 02-626

In The

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

*v.*

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

On a Writ of Certiorari
To The United States Court of Appeals For
The Eleventh Circuit

## Brief of *Amicus Curiae* National Association of Home Builders In Support of the Petitioner

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## TABLE OF CONTENTS

INTEREST OF *AMICUS* ..... 1

INTRODUCTION ..... 2

ARGUMENT ..... 6

I. THE CLEAN WATER ACT REGULATES ONLY THE DISCHARGE OF POLLUTANTS "INTO" WATERS. ..... 6

A. The Clean Water Act Water Pollution Control Framework. ..... 6

B. Refuse Act Origins. ..... 8

C. The Regulatory Design: Control the Dumping of Wastes Into Navigable Waters. ..... 9

II. MOVING WATER WITHIN THE DISTRICT'S WATER MANAGEMENT SYSTEM DOES NOT DISCHARGE POLLUTANTS INTO THAT WATER. ..... 12

A. The District is Not the Source of the Pollutants. ..... 13

B. The District Does Not Add the Pollutants Into the Water. ..... 13

C. The Act Does Not Regulate Water Movement. ..... 14

D. Congress Specifically Provided for Water Management Systems. ..... 16

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Catskill Mountains Chapter of Trout Unltd. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... 15

*Colautti v. Franklin*, 439 U.S. 379 (1979) ..... 13

*Dubois v. U. S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) ..... 15

*Exxon Corp. v. Hunt*, 475 U.S. 355 (1986) ..... 13

*International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ..... 10

*Kungys v. United States*, 485 U.S. 759 (1988) ..... 13

*Miccosukee Tribe of Indians v. South Florida Water Mgmt Dist.*, 280 F.3d 1364 (11th Cir. 2002) ..... 5, 12, 13

*Miccosukee Tribe of Indians v. South Florida Water Mgmt Dist.*, 1999 WL 33494862 (S.D. Fla.) ..... 12, 13

*National Wildlife Fed'n v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988) ..... 15

*National Wildlife Fed'n v. Gorsuch*, 693 f.2d 156 (D.C. Cir. 1982) ..... 15

*Rake v. Wade*, 508 U.S. 464 (1993) ..... 13

*Rodriguez v. United States*, 480 U.S. 522 (1987) ..... 5

*Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ..... 10



**Statutes and Legislative History**

***Clean Water Act***

33 U.S.C. § 1251 (a) ..... 3, 4, 7
33 U.S.C. § 1251 (b) ..... 4, 7. 16
33 U.S.C.§ 1251 (g) ..... 4, 16
33 U.S.C. § 1256 (a) ..... 4
33 U.S.C. § 1257 ..... 7
33 U.S.C. § 1258 ..... 7
33 U.S.C. § 1265 ..... 7
33 U.S.C. § 1266 ..... 7
33 U.S.C. § 1267 ..... 7
33 U.S.C. § 1268 ..... 7
33 U.S.C. § 1269 ..... 7
33 U.S.C. § 1273 ..... 7
33 U.S.C. § 1281 ..... 7
33 U.S.C. § 1288 ..... 7
33 U.S.C. § 1311 ..... 3, 7, 10, 13, 14, 16
33 U.S.C. § 1321 ..... 7
33 U.S.C. § 1342 ..... 5, 8
33 U.S.C. § 1344 ..... 8, 14
33 U.S.C. § 1345 ..... 7
33 U.S.C. § 1361(11) ..... 10
33 U.S.C. § 1362(6) ..... 3, 4, 8, 9, 10, 14, 17
33 U.S.C. § 1362(12) ..... 4, 7, 13
33 U.S.C. § 1362(14) ..... 7, 13
33 U.S.C. § 1362(19) ..... 4, 17
33 U.S.C. § 1381 ..... 7

***Refuse Act***

33 U.S.C. § 407 ..... 8

Sen. Debate on S. 2770 (1971), *reprinted in* 2 1972 Legis. Hist. at 1386 *and* 1 1972 Legis. Hist. at 177 (Senate Consideration of Conference Report on S. 2770) ..... 11

S. Rep. No. 92-414, at 76 (1971), *reprinted in* 2 Legis. Hist. at 1494 ..... 9

Conference Comm. Rep. No. 92-1236, at 139 (1972), *reprinted in* 1 Legis. Hist. of the Water Pollution Control Act Amendments of 1972, at 322 (1973) ..... 9

**Other**

Oxford American Dictionary (Oxford University Press 1999) ..... 7-8



## INTEREST OF *AMICUS*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the Petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 211,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. It is therefore concerned with any judicial decision that affects the regulation of land development, including the regulation of land development under the Clean Water Act ("CWA").[2] CWA permits are

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

[2] NAHB has been before the Court as an *amicus curiae* or as "of counsel" representing the interests of property owners in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home*

some of the most common permits that NAHB's members must obtain in their projects to provide housing for the Nation's citizens.

## INTRODUCTION

This case centers on whether the movement of water is inherently subject to regulation under the CWA.

The CWA regulates "discharges" of "pollutants" "into" navigable waters. It prohibits such discharges unless authorized and controlled by a permit. The Act defines "discharge" as an "addition," and it defines "pollutant" to mean certain enumerated biological and chemical waste materials, provided that they are "discharged into water." The Eleventh Circuit held that the South Florida Water Management District's movement of water between parts of its water management system is a "discharge" of a "pollutant" regulated by the Act. The holding outruns the law.

Water by its nature carries a variety of chemical and biological constituents, including sediment and plant and animal matter from within the water, and elements that naturally enter water after washing over land or passing through air. Fluid and nature being what they are, the types

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*Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002).



and amounts of constituents within water vary from virtually one molecule to the next, both laterally and horizontally.

If water is stirred by a spoon, pushed by an oar, or splashed by a hand, waterborne constituents could be said to be "added" to a new location in the water. But such movements of water could not be "additions" of pollutants, and thus "discharges" within the meaning of the Act, unless Congress intended to require a permit for virtually any activity that disturbs the surface of water. The Act demonstrates no such intent. Instead it evinces a clear intent to *regulate* only a limited albeit significant realm of activities: the disposal by a "source" of a "pollutant" through a "discharge" "into" navigable water. Other water pollution problems are addressed through other *nonregulatory* programs, such as the billions of dollars in authorized federal assistance for the construction of sewage treatment plants and the establishment of "state water pollution control revolving funds."

Congress's careful use of the terms "pollution" and "pollutant" reinforces the distinct regulatory versus non-regulatory realms of the Act. For instance, the Act establishes a national goal of eliminating the "discharge of pollutants," and prohibits the "discharge of any pollutant" unless authorized by a permit. 33 U.S.C. §§ 1311(a); 1251(a)(1). The term "pollutant" is inextricably tied to discharges: a substance meets the Act's definition of "pollutant" only if its is "discharged into water." *Id.* § 1362(6).

The statutory term "pollution," by contrast, is much broader, and is not tied to discharges. The term "'pollution' means the man-made or man-induced alteration of the

chemical, physical, biological or radiological integrity of water." *Id.* § 1362(19). Water that is polluted may be the result of "pollution" (man-induced change), but its constituents will not meet the definition of "pollutant" unless they have been "discharged" "into" the water "from" a "point source." *Id.* 1362(6), (12), (19).

The Act provides separately for water "pollution," including the goal of developing "programs for the control of nonpoint sources of pollution," recognizing the "rights of States to prevent, reduce and eliminate pollution," and providing grants to States and interstate agencies for the administration of "programs for the prevention, reduction, and elimination of pollution." *Id.* §§ 1251(a)(7); 1251(b); 1256(a). In fact, Congress specifically provided that the federal government "shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id.* § 1251(g).

The facts before the Court indicate that the District is not the source of the pollution in the water that it pumps from the canal. Nor does pumping water from one part of the District's water management system to another part add pollutants to water within the system any more than paddling a boat across a canal would add pollutants to one part of the canal and subtract them from another. Whether water is moved from one point in a canal to a different point in the canal, or to a different part of the water management system on the other side of a berm, is a distinction made nowhere in the Act. Of course, the Act nowhere prohibits the mere movement of water.

The Court of Appeals simply ignored the plain statutory language limiting the regulatory program to a



specific subset of polluting activities — i.e., the "discharge" of a "pollutant" from a "point source" "into" navigable waters — and establishing other nonregulatory mechanisms to address nondischarge forms of "pollution."[3] But Congress's specific choices as to what falls within the regulatory program must be honored. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

Requiring the District to obtain a permit for the movement of water between its structures not only exceeds the reach of the statute, but also requires the District to engage in an empty act. The District does not itself introduce the pollution into the water that moves through its system, nor does it determine the nature of that pollution. Rather, the type of pollution that is carried in the water is determined by the actual sources of the pollution. A permit establishing effluent limitations for water passing through the pump today would not necessarily treat the pollution that will pass through the pump tomorrow.

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[3] Perhaps betraying its confusion, the second sentence of the Court of Appeals's opinion states that the Water District is alleged to have discharged pollutants "without a national *pollution* discharge elimination system ("NPDES") permit." *Miccosukee Tribe of Indians v. South Florida Water Mgmt Dist.*, 280 F.3d at 1366 (emphasis added). The Act, of course, establishes the "national *pollutant* discharge elimination system" permit program. 33 U.S.C. § 1342.

The CWA regulatory program implements a basic concept: the nation's navigable waters are not to be used for the disposal of wastes unless the disposal is authorized and controlled by a permit. Far from disposing of a waste, the District's movement of water is central to its primary mission of managing water flows. Congress did not set out to regulate the millions of land owners, vessel operators, water suppliers, and others who simply move water in the course of their activities but discharge nothing "into" that water. Rather, it chose to regulate discharges of pollutants "into" the nation's waters by the actual "sources" of those pollutants.

The Eleventh Circuit's holding threatens to force a staggering range of activities that simply move or circulate water into the prohibitions and permit requirements of the Act. This result was neither specified nor envisioned by Congress. The holding must be reversed.

## ARGUMENT

### I. THE CLEAN WATER ACT REGULATES ONLY THE DISCHARGE OF POLLUTANTS "INTO" WATERS.

#### A. The Clean Water Act Water Pollution Control Framework.

Congress passed the Clean Water Act in 1972 in order to control discharges of untreated industrial and municipal wastes into the Nation's waterways. 33 U.S.C. §§ 1251-1387 (2000). The goals of the Clean Water Act are ambitious (to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"), but Congress—as it usually does—selected with care the



means to pursue those goals. *Id.* § 1251(a). The Act uses a mix federal financial assistance, incentives, and regulation to pursue its pollution abatement goals while, at the same time, emphasizing "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . . ." *Id.* §§ 1251(a)–(b).[4]

The regulatory permitting program is one of the Act's primary water pollution control components. Section 301 prohibits the "discharge" of any pollutant unless specifically permitted under the Act. *Id.* § 1311(a). The Act defines the term "discharge" as an "addition" of a pollutant to navigable waters "from" any "point source." *Id.* § 1362(12). "Point source" is defined in terms of conveyance: "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14). The Act does not define "source," but the dictionary defines it as "a place, person, or thing from which something originates." Oxford American

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[4] It authorized billions of dollars in federal assistance for the construction of municipal sewage treatment plants to end a principal cause of water pollution—the discharge of raw sewage into our Nation's waterways. *Id.* § 1281. It established a massive program of "State Revolving Funds" for state pollution control programs, *Id.* § 1381, and a State-led program for areawide waste treatment management planning. *Id.* § 1288. The Act launched comprehensive programs to reduce water pollution in specific navigable waters of national significance. See *Id.* §§ 1258, 1268 (Great Lakes); *Id.* § 1266 (Hudson River); *Id.* § 1267 (Chesapeake Bay); *Id.* § 1269 (Long Island Sound); *Id.* § 1273 (Lake Pontchartrain). The Act also created pollutant-specific programs. *See, e.g., Id.* § 1257 (mine water pollution); *Id.* § 1265 (toxic pollutants); *Id.* § 1321 (oil pollution); *Id.* § 1345 (sewage sludge).

Dictionary, 964 (1999). Finally, the definition of pollutant includes a variety of municipal, agricultural, chemical and biological spoils, wastes, and residues, garbage, rock, sand, and cellar dirt when "discharged *into* water." 33 U.S.C. § 1362(6) (emphasis added).

Section 402 provides one exception to the discharge prohibition. It authorizes EPA and delegated States to issue permits for discharges of pollutants such as industrial and municipal waste. 33 U.S.C. §§ 1342, 1362(6). Section 404 is another exception to the discharge prohibition. It authorizes the Corps of Engineers to issue permits for the "discharge of dredged or fill material *into* the navigable waters at specified *disposal* sites." *Id.* § 1344 (emphasis added).

**B. Refuse Act Origins.**

The 1899 Refuse Act makes it unlawful to

> throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind . . . into any navigable water of the United States.

33 U.S.C. § 407.[5] The focus of the prohibition is on the dumping ("throw, discharge or deposit") of waste ("refuse") "from" a ship or shore "into" navigable water.

[5] 33 U.S.C. § 407 is one section of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq*.



The CWA prohibition on the "discharge" of a pollutant "into" water can be traced to the 1899 Refuse Act. In the Report of the Senate Committee on Public Works, the committee explained that it had "extracted from the Refuse Act the basic formula . . . so that before any material can be added to the navigable waters authorization must first be granted by [EPA] under Section 402."[6] Indeed, the 1972 Conference Committee Report states, and the Act provides, that permits issued or applied for under the Refuse Act of 1899 are to be considered permits issued or applied for under section 402 of the CWA upon enactment.[7]

**C. The Regulatory Design: Control the Dumping of Wastes Into Navigable Waters.**

Like its Refuse Act predecessor, the CWA defines "pollutant" in terms plainly directed to wastes, byproducts and other unwanted materials dumped into water:

> The term "pollutant" means dredged *spoil*, solid *waste*, incinerator *residue*, *sewage*, *garbage*, sewage *sludge*, munitions, chemical *wastes*, biological materials, radioactive materials, *heat*, *wrecked* or *discarded* equipment, rock, sand, cellar dirt and industrial, municipal and agricultural *waste* discharged into water.

[6] S. Rep. No. 92-414, at 76 (1971), *reprinted in* 2 Legis. Hist. at 1494.

[7] Conference Comm. Rep. No. 92-1236, at 139 (1972), *reprinted in* 1 Legis. Hist. of the Water Pollution Control Act Amendments of 1972, at 322 (1973); 33 U.S.C. § 1342(a)(4) and (5).

33 U.S.C. § 1362(6). The definition nowhere suggests that discharge includes the recirculation of waterborne constituents inherent in the movement of water.

Congress clearly targeted the industrial and municipal entities that were dumping chemicals, sewage and other pollutants into the nation's waterways when it passed the CWA in 1972.[8] The discharge prohibition and permitting program is specifically designed to control pollution by regulating and requiring the treatment of polluted effluent.[9] In fact, section 301 is titled "Effluent limitations" and, after setting out the Act's general discharge prohibition, requires the development of effluent limitations for the treatment of pollutants discharged from point sources. 33 U.S.C. § 1311(b).[10] Congress's intent to regulate the "disposal" of pollutants into water is reinforced by the terms of section 404, which direct that permits for

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[8] Waterways burned in the years leading up to the CWA's enactment. "In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the [CWA]." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174-75 (2001) (Stevens, J., dissenting);

[9] *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("One of the primary features of the [Clean Water Act is] a federal permit program designed to regulate the discharge of polluting effluents.").

[10] Effluent limitations are "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1361(11).



discharges of dredged and fill material specify the "disposal" site.[11]

The plain language selected by Congress in framing the discharge prohibition, permit exceptions and definitions of key terms within those provisions clearly demonstrates its intent: to prohibit the discharge "into" navigable water of waste unless the source of the waste treats and is authorized to discharge the waste under a permit. It did not create a new scheme whereby a permit is required for the mere movement of water, even polluted water. Indeed, if Congress intended such a sweeping permitting requirement, one would expect explicit language to that effect in the statute and its legislative history. Prohibiting or requiring a permit for the mere movement of water and accompanying incidental changes in waterborne constituents goes far beyond the language or purpose of the Act.

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[11] Congress's use of the term "specified disposal sites" is consistent with the common dredging practice of excavating material *from* one place and dumping it *into* another area—*viz.*, the "specified disposal site." *See* Sen. Debate on S. 2770 (1971), *reprinted in* 2 1972 Legis. Hist. at 1386-90 (colloquy among Senators Ellender, Muskie, and Stennis) (disposal of dredged material in open water is "essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States") and 1 1972 Leg. Hist. at 177 (Senate Consideration of Conference Report on S. 2770) (EPA "should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.").

## II. MOVING WATER WITHIN THE DISTRICT'S WATER MANAGEMENT SYSTEM DOES NOT DISCHARGE POLLUTANTS INTO THAT WATER.

The C-11 Canal (C-11) and Water Conservation Area-3A (WCA-3A) are components of the Central & Southern Florida Flood Control Project. *Miccosukee*, 280 F.3d at 1366. The District manages the Project through the operation of numerous levees, canals and water impoundment areas. *Id.* The C-11, WCA-3A and other Project components were "part of the historical Everglades . . . a single body of navigable water." *Id.* at 1369, n. 8. The C-11 was dug by the Army Corps of Engineers in the early 1900's and is now separated from the WCA-3A to its west by a levee. *Id.* at 1366. The C-11 collects water that seeps from the WCA-3A through the levee into the C-11, as well as runoff from the land surrounding the C-11. *Id.* The S-9 pump station then "backpumps" water from the canal through three pipes connecting the C-11 to the WCA-3A. 1999 WL 33494862, *1 (district court opinion); 280 F.3d at 1366. Thus, the C-11 and WCA-3A comprise part of the Project's system of keeping at bay the water that would otherwise flow eastward from the Everglades and flood populated areas of South Florida "within days." *Id.* at 1366.

The S-9 "adds no pollutants to the water which it conveys" to the WCA-3A. *Id.* at 1366. Water in the C-11, however, "contains higher levels of phosphorous than that naturally occurring in WCA-3A" as a result of runoff from surrounding land. *Id.*; *see* 1999 WL 33494862, *7. Finding that the pumping results in the "addition of low levels of phosphorus to WCA-3A," the court of appeals held that "the release of water caused by the S-9 pump station's operation constitutes an addition of pollutants



from a point source." *Id.* at 1368-71. But several critical elements of a regulated discharge are missing.

### A. The District is Not the Source of the Pollutants.

The discharge prohibition applies to additions of pollutants from "point sources." 33 U.S.C. §§ 1311, 1362(12) and (14). The S-9 pump may be the point at which pollutants enter the WCA-3A, but as the Court of Appeals recognized, it is not the source of the pollutants. 280 F.3d at 1366. Thus, the court's holding reads the word "source" out of the statutory term "point source" contrary to the fundamental statutory construction principle that words in a statute are to be given effect rather than treated as surplusage[12] Because the CWA permitting requirement applies to the "point source" of a discharge and the District is not the source of the pollution, the District's pumping of water between its control structures is not a regulated discharge.

### B. The District Does Not Add the Pollutants into the Water.

The court of appeals specifically recognized that the S-9 "adds no pollutants to the water which it conveys" to the WCA-3A. *Id.* at 1366. Rather, the facts demonstrate that the water in the C-11, including phosphorous and other

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[12] It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality by Scalia); *see, e.g. Rake v. Wade*, 508 U.S. 464 (1993); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Every word and phrase is presumed to add something to the statutory command. *See Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986).

constituents, is the product of runoff from surrounding lands and seepage from the WCA-3A itself. Thus, the pollution in the C-11 is not "added" by the District, but instead results from a wide variety of activities that are not controlled by the District — e.g., a resident washing his car in his driveway or a farmer applying pesticides to her fields. Such activities, and the types of pollution they produce, could vary significantly from one day to the next.

Finally, the discharge prohibition is focused on the *disposal* of pollutants — "spoil . . . waste . . . residue, sewage, garbage, sewage sludge . . . wrecked or discarded equipment . . . industrial, municipal and agricultural waste" — through discharges into navigable waters. 33 U.S.C. § 1362(6). The District's management of water within its system components, including continuously backpumping to the west water that would otherwise flow to the east and flood populated areas of South Florida, is not the disposal of a pollutant. Indeed, if it were, any conveyance of water from one part of a water management system to another would require a permit — a result in no way suggested by the definition of pollutant and at odds with the statute's use of terms such as "discard[]," "dispose" and "waste." 33 U.S.C. §§ 1344, 1362(6).

### C. The Act Does Not Regulate Water Movement.

The statute by its plain terms regulates the discharge of pollutants "into" navigable water. 33 U.S.C. §§ 1311, 1362(6). The statute nowhere regulates the movement of polluted water. For over twenty years the caselaw has held that when water is conveyed through a water control structure, such as where water is conveyed from a lake behind a dam to a river below or is circulated between a



lake and a water storage reservoir, no addition of pollutants occurs regardless of any water quality changes that result.

The D.C. Circuit held in *National Wildlife Federation v. Gorsuch* that no addition of a pollutant occurs where water behind a dam passes through the dam and continues with "dam induced water quality changes" in the stream below because no pollutant is introduced "into water from the outside world." 693 F.2d 156, 161-175 (D.C. Cir. 1982). Similarly, in *National Wildlife Federation v. Consumers Power*, water in Lake Michigan was passed through a storage reservoir and turbines on the shore for hydropower and back to Lake Michigan with pollutants not present before the diversion. The court held that no addition of pollutants occurred because the facility "merely changes the movement, flow or circulation" of the water, but it "never loses its status as a water of the United States" during the diversion. 862 F.2d 580, 588-89 (6th Cir. 1988).[13]

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[13] The Court of Appeals cast off *Gorsuch* and *Consumers Power* in a footnote with the *nonsequitur* observation that it "know[s] of no instance" extending the rule upheld in those cases to "facilities like the S-9 pump station." 280 F.3d at 1368, n.4. The court of appeals likened its holding to *Catskill Mountains Chapter of Trout Unltd. v. City of New York* and *Dubois v. U.S. Dep't of Agric.*, but those cases did not involve the movement of water within a single water management system constructed within "a single body of navigable water." *Id.* at 1369, n. 8; 273 F.3d 481 (2d Cir. 2001); 102 F.3d 1273 (1st Cir. 1996). Furthermore, *Catskill* and *Dubois* appear to stretch the Act beyond regulating the *disposal* "into" water of *wastes* "from" sources and into the regulation of the incidents of water movement, and therefore NAHB does not concede that their holdings are correct.

The required statutory element is a discharge *into* water. Mere movement of waterborne constituents within the District's water management system does not discharge pollutants *into* water.

### D. Congress Specifically Provided for Water Management Systems.

There is an obvious reason that attempting to force the District's management of its water resources into the Act's permitting program causes statutory problems at every turn. Congress never intended it. In fact, Congress specifically provided the means for addressing the District's water management actions, and in doing so illustrated the inaptness of the permitting program.

After emphasizing "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources. . . .," the Act specifies that "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce, and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. § 1251(b), (g).

Thus, the Act mandates a cooperative approach to addressing pollution through water management programs, not the coercive control of the permitting program. That section 301 prohibits the discharge of "pollutants" while sections 101(b) and (g) address water "pollution" is particularly telling. 33 U.S.C. §§ 1251 (b) and (g), 1311(a). The Act generally defines "pollutants" as wastes discharged "into" navigable water, yet "pollution" is defined as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."



*Id.* at § 1362(6) and (19). The Act's plain language supports the conclusion that the District's movement of water does not belong under the Act's permitting program.

## CONCLUSION

For all of the foregoing reasons, the Eleventh Circuit's decision should be reversed.

DATED: September 10, 2003

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents*.

---

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF FOR THE UTILITY WATER ACT GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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33 pp

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iii |
| INTEREST OF *AMICUS* | 1 |
| INTRODUCTION | 4 |
| AGRUMENT | 6 |
| I. THE TRANSFER OF WATER FROM ONE PLACE TO ANOTHER DOES NOT CHANGE THE WATER INTO A "POLLUTANT" OR MAKE THE TRANSFER AN "ADDITION" OF A "POLLUTANT" | 8 |
| A. No Matter How Pristine, Water Is Never Entirely Free of "Pollutants" | 9 |
| B. That Water is Polluted Does Not Make It a "Pollutant" Under the Clean Water Act, and the Transfer of Such Water From One Watercourse to Another Is Not the "Addition" of a Pollutant | 10 |
| II. THE ELEVENTH CIRCUIT IMPROPERLY IGNORED OR REJECTED LONG-STANDING PRECEDENTS RELEVANT TO THIS ISSUE, INCLUDING EPA'S OWN INTERPRETATION OF ITS JURISDICTION | 13 |
| III. THE ELEVENTH CIRCUIT'S INTERPRETATION IS NOT SUPPORTED BY LEGISLATIVE HISTORY OR CONSISTENT WITH OTHER PROVISIONS OF THE CLEAN WATER ACT | 18 |

TABLE OF CONTENTS—Continued

Page

IV. HOLDING THE WATER MANAGEMENT DISTRICT RESPONSIBLE FOR POLLUTANTS IT CANNOT ANTICIPATE OR CONTROL WOULD VIOLATE DUE PROCESS ..... 23

CONCLUSION ..... 25



TABLE OF AUTHORITIES

FEDERAL CASES

Page

*American Iron & Steel Inst. v. EPA*, 115 F.3d 979 (D.C. Cir. 1997) ..... 8

*American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (3d Cir. 1975), *amended on other grounds*, 560 F.2d 589 (1977), *cert. denied*, 435 U.S. 914 (1978) ..... 24

*American Petroleum Inst. v. EPA*, 540 F.2d 1023 (10th Cir. 1976), *cert. denied, Exxon Corp. v. EPA*, 430 U.S. 922 (1977) ..... 24

*Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) ..... 8

*Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002) ..... 11

*Bettis v. Ontario*, 800 F. Supp. 1113 (W.D.N.Y. 1992) ..... 5

*Catskill Mountains Chapter of Trout Unlimited, Inc v. City of New York*, 273 F.3d 481 (2d. Cir. 2001) ..... 12, 13, 15, 23

*Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... 15

*Christensen v. Harris County*, 529 U.S. 576 (2000) ..... 15

*Colautti v. Franklin*, 439 U.S. 379 (1979) ..... 11

*Diamond Shamrock Corp. v. Costle*, 580 F.2d 670 (D.C. Cir. 1978) ..... 8

*Dubois v United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) ..... 12

*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) ..... 25

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 24

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 2638 (2003) | *passim* |
| *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) | 3, 7, 14, 18 |
| *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) | *passim* |
| *Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F.2d 156 (D.C. Cir. 1988) | 8 |
| *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) | 23 |
| *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700-(1994) | 3 |
| *Solid Waste Agency of Northern Cook Co. v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) | 21, 25 |
| *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985) | 12 |
| FEDERAL STATUTES | |
| Clean Water Act §§ 208, 319, 33 U.S.C. §§ 1218, 1329 | 18 |
| Clean Water Act, 33 U.S.C. §§ 1251-1387 | 2 |
| Clean Water Act § 101(g), 33 U.S.C. § 1251(g) | 19 |
| Clean Water Act § 304(f), 33 U.S.C. § 1314(f) | 22 |
| Clean Water Act § 319(a)(1)(A), 33 U.S.C. § 1329(a)(1)(A) | 18 |
| Clean Water Act § 402, 33 U.S.C. § 1342 | 5 |
| Clean Water Act § 402(d)(2), 33 U.S.C. § 1342(d)(2) | 21 |
| Clean Water Act § 502(6), 33 U.S.C. § 1362(6) | 6, 11 |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Clean Water Act § 502(12), 33 U.S.C. § 1362(12) | 6 |
| Clean Water Act § 502(19), 33 U.S.C. § 1362(19) | 18 |
| FEDERAL REGULATIONS | |
| 40 C.F.R. § 122.2 (2002) | 15 |
| 40 C.F.R. Part 122 (2002) | 13 |
| 52 Fed. Reg. 37,010 (Oct. 2, 1987) | 9 |
| MISCELLANEOUS | |
| 3 *A Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess. 532 (Oct. 1978) (Senate Debate of Dec. 15, 1977) | 20 |
| EPA, Implementing the Guiding Principles through State and Tribal Watershed Ap proaches, *available at* http://www.epa.gov/owow/watershed/framework/ch6.html | 17 |
| Everglades Forever Act, FLA. STAT. ch. 373.4592(9)(k) & (l) (2002) | 18 |
| G. Tracy Mehan, III, Committing EPA's Water Program to Advancing the Watershed Ap proach (December 3, 2002), *available at* http://www.epa.gov/owow/watershed/ memo.html | 17 |
| Gilbert M. Masters, *Introduction to Environmental Engineering and Science* 107-09 (1991) | 9 |
| John T. Holleman, *In Arkansas Which Comes First, the Chicken or the Environment?*, 6 TUL. ENVTL. L.J. 21, 29 (1992) | 9 |

TABLE OF AUTHORITIES—Continued

Page

Michael Brush, Water, Water, *Everywhere*, 12 *THE SCIENTIST* 18 (June 8, 1998), *available at* http://www.the-scientist.com/yr1998/june/profile1_980608.html ..... 9

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S. Rep. No. 92-414 at 70 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3736 ..... 24

IN THE

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SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
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MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR THE UTILITY WATER ACT GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

## INTEREST OF *AMICUS*

*Amicus* Utility Water Act Group (UWAG) represents the electric power industry in this country.[1] UWAG is an association of 158 individual electric utilities and three national trade associations of electric utilities, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual utility companies operate power plants and other facilities that generate, transmit, and distribute elec-

[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief, and *amicus* paid for it. This brief was not written in whole or in part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

tricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of nonprofit electric cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly owned electric utilities in the United States. UWAG's purpose is to participate on behalf of its members in the United States Environmental Protection Agency's (EPA's) rulemakings under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. V 2000), and in litigation arising from those rulemakings.

The electric power industry generates and distributes the electric energy that is a foundation of the American economy, more so with every passing year of the computer age. We will refer to ourselves as the "Power Companies." Electricity is so important that, like water, there is a legal duty to supply it to the public.

The Power Companies urge the Court to reverse the Eleventh Circuit's *Miccosukee* decision. *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 2638 (2003). That decision stretches the term "discharge of pollutants" (and indeed the entire Clean Water Act permitting program) well past the breaking point, proposing to require water users to remove pollutants contributed by natural causes or by other persons and threatening years of settled law affecting power facilities. In so doing, the decision unduly constrains prudent State and local management of the water resources on which power generation by hydroelectric and steam electric generating facilities rely, ignoring the



Clean Water Act's explicit reservation of that authority to the States.

The Power Companies have two particular concerns. The first is hydroelectric facilities. A hydroelectric dam releases water through the dam's turbines to generate power. That water always contains background pollutants to begin with, and the mere process of passing water through turbines may change the quality of the water. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 161-164 (D.C. Cir. 1982), and *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 82 F.2d 580 (6th Cir. 1988). Nevertheless, passing the water through the dam to the river below has never been considered a "discharge of a pollutant" requiring an NPDES permit, and two courts of appeals have so held, as explained below. The *Miccosukee* decision, while not directly addressing dams, correctly recognizes EPA's policy that hydropower facilities do not require permits for the discharge of pollutants, and this Court should likewise not disturb this longstanding precedent, especially since dams are already comprehensively regulated to protect water quality. In particular, in the wake of the Court's decision in *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), hydropower projects licensed by the Federal Energy Regulatory Commission are subject to extensive federal and state water quality reviews and license conditions under section 401 of the Clean Water Act as well as under the Federal Power Act, Endangered Species Act, and National Environmental Policy Act. To add yet another layer of water quality review by the same agencies under the same Clean Water Act would be unwarranted and inappropriate.

Second, the Power Companies are concerned about the decision's effect on the availability of water to disperse waste heat from the electricity generating process. Many steam electric power plants withdraw once-through cooling water, which they use to condense and cool steam after it generates

electricity. Some power plants use "closed-cycle cooling" (cooling towers), for which they still need to withdraw water (though in smaller quantities) from a river or a lake. In either case, the cooling water is returned to a receiving waterbody, typically though not always the same waterbody from which it came.

The Power Companies rely on State and local water managers to consider their cooling water and process water needs and any water rights to which they are entitled by operation of law or contract to ensure that essential water resources are available. The Eleventh Circuit's opinion, by raising doubts about a water user's responsibility for pollutants he or she did not add, jeopardizes that reliance.

## INTRODUCTION

The Eleventh Circuit's *Miccosukee* decision is a radical one. It holds that "[w]hen a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed," that action itself is a "discharge of pollutants" because it is the "cause-in-fact of the discharge of pollutants." *Miccosukee*, 280 F.3d at 1368. In reaching this conclusion the court made several errors.

First, the court determined, apparently as a matter of law, that the water segments from and to which the water is pumped in this Florida locale are "separate and distinct." *Id.* at 1369 n.8. The court ignored the fact that the S-9 pumping station did not by itself cause the change in the "natural" flow of waters that once intermingled. And it made no attempt to inquire whether, under governing State law, the water segments should be considered part of the same "body of water."



Second, the court created its own interpretation of the statutory term "discharge of pollutants," ignoring the plain language and structure of the statute as well as EPA's longstanding interpretation of the term and well-established judicial precedents accepting EPA's interpretation.

Section 402 of the Clean Water Act, 33 U.S.C. § 1342 (1994), requiring NPDES ("National Pollutant Discharge Elimination System") permits for the "discharge of a pollutant," is a provision for permitting the release of pollutants from industrial plants and municipal wastewater treatment works, and it has been interpreted that way for 30 years. Other provisions of the statute, as well as the structure of the Act generally and the NPDES program specifically, support the view that NPDES permit requirements were never intended to constrain water resource management, even assuming, for the sake of argument, that a transfer of water between two legally distinct waterbodies has occurred.

Yet the Eleventh Circuit opinion could be interpreted to make illegal, without an NPDES permit, virtually all use and management of water unless the water ends up back in the "same body of water" (as judged by the court, not the State or the permit writer) from which it was taken. This would make any movement of water to what a court deems a "distinct waterbody" subject to federal oversight and possible veto, and to the particular mechanisms of the NPDES permit program such as "technology-based" permit limits, which are clearly inappropriate for transfers of water.

Water itself is not a pollutant. *Bettis v. Ontario*, 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992). But all water, everywhere, contains substances that would be "pollutants" if added to water by a point source. Some are waste products added by humans. Some are added by Nature. Some occur as a result of conditions instream, including hydrological changes or rerouting attributable to humans. It is clear from

both the plain language of the statute and its structure that only the first of these causes—the addition of one or more of the statutorily enumerated "pollutants" to "navigable water" and only if "from" a "point source"—is subject to the prohibition against the "discharge of pollutants" to which NPDES permit requirements apply.

There is no dispute in this case about whether the South Florida Water Management District ("Water Management District" or "the District") added any pollutants to the water it was charged by the State with managing—it did not. Yet because a pollutant (phosphorous) was present in the water as a result of natural causes or other point or nonpoint sources, the Eleventh Circuit has decided to treat that water itself as a pollutant and its management within the Everglades as a "discharge of pollutants." The court is incorrect on both counts.

## ARGUMENT

According to the Clean Water Act, the action that requires a permit is the "addition" of a "pollutant" "to" navigable waters "from" a "point source." Clean Water Act § 502(12), 33 U.S.C. § 1362(12) (1994). (The definition of "pollutant," 33 U.S.C. § 1362(6), says "into" water.) The question raised by the *Miccosukee* decision is whether a "discharge of pollutants" occurs when humans merely *move* water that already contains pollutants.

Even if we were to accept for the sake of argument, which we do not, that the two sides of the levees in this case were properly treated as legally distinct despite the historical connection of the areas, the plain language and structure of the Act show that water management activities of this kind are not subject to NPDES permitting requirements. The water pumped by the Water Management District was not itself a "pollutant" as the statute defines that term. And even though the water contained pollutants added by other point or



nonpoint sources, no "addition from" the point source at issue here (the S-9 pumping station) occurred.

The court's conclusion to the contrary rests on its own reinterpretation of the phrase "addition from." The court chose to reject EPA's longstanding interpretation and well-established precedent finding that EPA's interpretation is reasonable. Also, the court did not discuss (and apparently never considered) other provisions of the statute that reserve to the State authority over water resource allocation and management and that describe flow diversions as causes of "pollution," not discharges of "pollutants." And in construing "discharge of pollutants" to include actions designed to manage the flows of already polluted waters, the court never stopped to consider whether its view of the scope of the NPDES program was consistent with the larger structure of the Clean Water Act or whether there might be due process problems with such a sweeping view. Also, as we have mentioned, the court made a legal determination that the C-11 Basin and the WCA-3A area are distinct, without any discussion of relevant State or federal law.

For these reasons, which we will elaborate on in the rest of this brief, the Power Companies urge the Court to overturn the Eleventh Circuit's decision in this case and to clarify that no NPDES permit is required for transfers of water of the sort involved in this case. Even if the Court does not overturn the decision below, we encourage the Court (1) to take great care not to upset settled law as to hydropower projects, namely the *Gorsuch* and *Consumers Power* decisions cited above, and (2) to keep the focus of the decision narrow and not venture into other issues that also are not before the Court.

Specifically, if the Court does not overturn the Eleventh Circuit's decision, the Court need not and should not reach a related but distinct question that is not presented on the facts here: Where (unlike here) a point source discharge of pollutants actually occurs, is the point source responsible not

only for the pollutants it adds but also for other pollutants that it does not add but that are present in its source or "intake" water? The only court to have squarely considered this question concluded that point sources are not responsible for such "intake pollutants." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976). Other courts, asked to opine on the validity of EPA's "intake credit" rules, have found those rules unripe for review. *See American Iron & Steel Institute v. EPA*, 115 F.3d 979, 998-99 (D.C. Cir. 1997); *Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F.2d 156, 204-05 (D.C. Cir. 1988); *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978).

The Power Companies do not believe that this case is a suitable setting for engaging this important question. We note, however, that the Eleventh Circuit's decision in *Miccosukee* raises the same types of jurisdictional and due process concerns that are raised by the "net/gross" issue.

## I. THE TRANSFER OF WATER FROM ONE PLACE TO ANOTHER DOES NOT CHANGE THE WATER INTO A "POLLUTANT" OR MAKE THE TRANSFER AN "ADDITION" OF A "POLLUTANT"

If merely collecting and pumping polluted water required a Clean Water Act permit, then anyone who moved water from one place to another, even if the water was not a waste product and the user had introduced no substances of any kind, would need a permit.

The implications of such a result would be disturbing, simply because *all* water contains substances, some of which may well be "pollutants" from many sources. This means that all transfers of water to a different waterbody, under the Eleventh Circuit's reasoning, would be illegal without an NPDES permit, thereby transforming even purely intrastate water resource management decisions into functions that the



federal government would have to oversee through the NPDES permit program.[2] This plainly is not what the Clean Water Act anticipates.

### A. No Matter How Pristine, Water Is Never Entirely Free of "Pollutants"

The nation's waters, no matter how untouched by humans, have never been pure like distilled water[3]. To the contrary, all natural water contains substances, some "good" and some "bad," depending on the context.

Many substances are added to water by nature.[4] Coliform bacteria come from the digestive tracts of birds, deer, and beaver. Other naturally occurring substances leach out of soil or rock and into the water. As many as 50 minerals occur

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[2] Typically it is the State, not the federal government, that administers the NPDES permit program. But even so, a State-issued NPDES permit is subject to review and disapproval by EPA. More important, the *mechanism* for regulating the water is the particular type of permit, with measures such as technology-based permit limits, prescribed by the federal statute. This is an enormous change from allowing States to regulate water resources in their own ways.

[3] Even the purest water (used, for example, in the semiconductor and pharmaceutical industries or in laboratories) is not free of contaminants. Type I or ultrapure water is the most pure reagent-grade water for laboratories. For practical purposes, Type I water has a specific resistance of at least 18 megohms-cm and meets other criteria for specific conductance (micromhos per centimeter), total silica, total organic carbon, and bacterial count. *See* Michael Brush, *Water, Water, Everywhere*, 12 *THE SCIENTIST 18* (June 8, 1998), *available at* http://www.the-scientist.com/yr1998/june/profile1_980608.html.

[4] *See generally* Gilbert M. Masters, *Introduction to Environmental Engineering and Science* 107-09 (1991) (naturally occurring organic matter, protozoa from wild animals); EPA, Sole Source Aquifer Petition, 52 Fed. Reg. 37,010 col. 2 (Oct. 2, 1987) (final determination) (dolomite); John T. Holleman, *In Arkansas Which Comes First, the Chicken or the Environment?*, 6 TUL. ENVTL. L.J. 21, 29 (1992) (coliform bacteria in warm-blooded animals).

naturally in water, including calcium, magnesium, silica, and fluoride. A river with a bed of dolomite will contain calcium and magnesium. Streams pick up organic acids as they flow through swamps or sulfur from sulfur springs. Phosphorous in water can come from human sources (fertilizer) or natural ones, such as weathering of phosphate rocks and bird guano.

Also, pollutants are added by events, both natural and human. Man may add wastes from point sources or nonpoint sources. A variety of substances, some natural and some manmade, settle onto the water from the air. To give just one example, rainwater falling through air picks up carbon dioxide and becomes weak carbonic acid, which can slowly dissolve limestone. By this means many of the country's caves were created. Sunlight heats the water. Severe weather creates turbidity. The variety of changes that can occur is endless and, of course, constantly changing.

### B. That Water is Polluted Does Not Make It a "Pollutant" Under the Clean Water Act, and the Transfer of Such Water From One Watercourse to Another Is Not the "Addition" of a Pollutant

Section 502 of the Clean Water Act defines "pollutant' as a waste material discharged into water:

> The term pollutant means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.



Clean Water Act, 33 U.S.C. 1362(6) (Supp. V 2000).

This definition is broad but by no means unlimited. This Court has recognized that use of the restrictive term "means" instead of the looser phrase "includes" generally indicates Congress' intent to exclude any meaning that is not stated. *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (citations omitted); s*ee also Gorsuch*, 693 F.2d at 172.

The specific items Congress chose to list share one important characteristic: they are all "waste material of a human or industrial process." *Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002). Notably, the list does not include already polluted natural waters. Instead, what Congress intended to prohibit, absent a permit, was the addition to navigable waters of one or more of the enumerated manmade waste materials from a point source.

Here the Water Management District added no waste material to navigable waters. Everyone agrees that any waste material present in the waters managed by the District was added by other sources. *Miccosukee*, 280 F.3d at 1366. Some of that waste material may have been added from permitted point sources; some from unpermitted "nonpoint" sources like fertilizer on farmers' fields, which are controlled by States under Clean Water Act provisions other than the NPDES permit requirement; and some from natural causes.

The Eleventh Circuit says that an "addition" of manmade wastes "to navigable waters" "from" a point source occurs each time those wastes pass from one "distinct" watercourse

to another via a point source. *Id.* at 1368-69. Under this theory, only the receiving waterbody is a "navigable water." *Id.* at 1368. In effect, the source water becomes the "pollutant."

There is no support in the statute for such an interpretation, and the Eleven Circuit cites none. Instead, as support for its decision, the court cites three cases: *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d. Cir. 2001); *Dubois v United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996); and *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985) (history omitted).

The court's reliance on *Dubois* and *M.C.C.* is misplaced. In both cases the point source in question itself "added" material that at least arguably met the definition of "pollutant."

In *Dubois* the point source took water from one navigable water, used it in its snowmaking equipment, and discharged it to another navigable water. The parties contested whether pollutants were added during the snowmaking process, but the First Circuit did not reach that issue because it found, in effect, that the source water had ceased to be a "navigable water" and became a wastewater when it was taken out of navigable waters and used by humans. *Dubois*, 102 F.3d at 1296-97. Even if *Dubois* is correct, it is readily distinguishable from the *Miccosukee* case. In *Dubois* the water was removed from the waterbody, made into snow, used for a commercial purpose, melted, and returned to the waterbody; in *Miccosukee* the water was merely pumped through a manmade structure to a different location.

In *M.C.C.* boat propellers ripped up bottom sediments, allegedly to create a channel and redeposit the unwanted "dredged material" outside the channel. *M.C.C.*, 772 F.2d at 1505-06. Thus, while the critical statutory element of an



addition "into" water was missing, at least the activity being regulated was the disposal of waste (dredged spoil), not the mere movement of water as in this case.

Only the Second Circuit's decision in *Catskill Mountains* fits the analytical framework adopted by the Eleventh Circuit in *Miccosukee*. The Power Companies believe that in both cases that analysis is, quite simply, wrong. As we discuss below, neither court adequately considered EPA's long-standing interpretation of the statutory terms, which has been reviewed and upheld by Courts of Appeals for both the D.C. Circuit and the Sixth Circuit. In a rush to require a permit, neither court looked at whether the NPDES permit program is designed to regulate the activity in question. And neither court adequately considered other statutory provisions that indicate Congress' intent to treat water management activities of this kind as "nonpoint" sources and to leave water resource allocation to the States.

## II. THE ELEVENTH CIRCUIT IMPROPERLY IGNORED OR REJECTED LONGSTANDING PRECEDENTS RELEVANT TO THIS ISSUE, INCLUDING EPA'S OWN INTERPRETATION OF ITS JURISDICTION

EPA has never interpreted the term "discharge of pollutants" to include transfers of navigable waters, even between two distinct segments. Indeed, it has been EPA's longstanding position, articulated contemporaneously with the passage of the statute, that an "addition of pollutants to navigable waters from a point source" occurs when a point source from outside navigable waters introduces a material meeting the definition of a "pollutant" into navigable waters. EPA has fully articulated this position, reflecting its interpretation both of the statute and its NPDES rules implementing the statute (40 C.F.R. Part 122 (2002)), in cases

contesting its decision not to require NPDES permits for hydroelectric dams.

As EPA has said and the courts have long recognized, the term "addition from" is a limiting factor, used to distinguish pollutants that are added—and therefore subject to regulation—from those that merely pass through a point source:

> [I]t does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

*Gorsuch*, 693 F.2d at 176. Indeed, EPA itself argued in *Gorsuch* that "any addition must occur 'from' a point source and not merely through a point source." *Id.* at 175 n.58. EPA explained that "the point or nonpoint character of pollution is established when the pollutant *first* enters navigable water, and does not change when the polluted water later *passes* . . . from one body of navigable water . . . to another . . . ." *Id.* at 175 (characterizing EPA's argument) (emphasis added).

EPA has articulated its position in a variety of documents stemming back very nearly to the passage of the Act. *See Gorsuch*, 693 F.2d at 167 n.33 (discussing EPA's consistent contemporaneous interpretation). EPA's interpretation has been thoroughly reviewed, found reasonable and consistent with the statute, and affirmed by both the D.C. Circuit and the Sixth Circuit. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (upholding EPA position that "added" means "introduction of pollutant to water from outside world" as reasonable construction of statutory terms); *Gorsuch*, 693 F.2d at 167 (concluding that EPA interpretation is entitled to great deference because it was made by the regulatory agency charged with enforcing the statute, was consistent and contemporaneous, reflected agency expertise, was thorough, and was a reasonable interpretation of the



statutory terms, taking into account both specific terms and policies of the Act).

The Eleventh Circuit scorned any argument about EPA's interpretation, claiming that it could "ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference."[5] *Miccosukee*, 280 F.3d at 1368 n.4. How the Eleventh Circuit could conclude that EPA's interpretation of the very statutory terms at issue here was wholly irrelevant to the court's analysis, we cannot tell. Suffice it to say that Power Companies believe the court had an obligation to consider EPA's interpretation before substituting its own interpretation based largely on a selective reading of the Random House Dictionary and its uncritical acceptance of *Catskill Mountains*.

But even if this Court were to give no deference at all to EPA's interpretation, the Eleventh Circuit's contrary inter-

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[5] EPA has adopted a rule defining the "discharge of pollutants" in general terms. *See* 40 C.F.R. § 122.2 (2002). EPA has consistently said that that definition, and the accompanying permitting rules, do not apply to the passage of pollutants from one waterbody to another. Any argument that EPA's interpretation is not entitled to *Chevron* deference because it is just a "policy statement" is therefore inapposite. See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In any case, requiring an agency to go through a rulemaking each time it decides *not* to regulate as the price of receiving *Chevron* deference does not seem to be what this Court had in mind in *Christensen v. Harris County*, 529 U.S. 576 (2000). In that case, the Court considered the amount of deference to be accorded a Department of Labor opinion letter setting conditions for compensatory time payments, where those conditions were not authorized by the statute. The Court said the opinion letter deserved "respect," but only to the extent the opinion had the "power to persuade." *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Court considered the Department's opinion but did not find it persuasive given the specific terms of the statute. Here the Eleventh Circuit has not considered EPA's interpretation of the specific terms of the statute or explained why it is not apposite or does not have the "power to persuade."

pretation would fail on its own merits. The Eleventh Circuit's theory of what constitutes an addition "from" a point source is based primarily on the dictionary, the *Random House Dictionary of the English Language* 770 (2d ed. 1987), to be precise. See *Miccosukee*, 280 F.3d at 1368 n.6. From among the multiple definitions there, the court selected two; it says that "from" can mean "agent or instrumentality" or "cause or reason." *Id.* These two the court prefers to "source or origin" or its use as a preposition "used to specify a starting point in spatial movement." *See Random House Dictionary of the English Language* 770 (2d ed. 1987). Based on its selection, the court then leaps to the conclusion that "from" means "by" and that the relevant inquiry therefore is whether "but for the point source—the pollutants would have been added to the receiving body of water." An addition from the point source occurs, says the court, if a point source is the cause-in-fact of the release of pollutants into navigable waters. *Miccosukee*, 280 F.3d at 1368. One might summarize the logic this way:

> from = agent, instrumentality, cause or reason = by = cause-in-fact.

Even if the court's tour of the dictionary made sense, which we submit it does not, the Eleventh Circuit was not entitled to select its favorite definition, rather than other, equally plausible definitions, and apply it without regard to other applicable statutory provisions or relevant precedent.

Yet this is just what the court did. In essence, it concluded that a distinct navigable water containing pollutants equals a pollutant from the outside world and that routing navigable waters from one segment to another through a pump equals an addition of pollutants from the pump. Other than the (admittedly laudable) goal of preventing pollution, it cites no legislative authority for this proposition. As we show in the following discussion, there is none.



Moreover, the Eleventh Circuit's taking for itself the job of defining what is a distinct "waterbody" runs afoul of EPA policy. For about a decade EPA has been encouraging a "watershed approach" to regulating water quality. G. Tracy Mehan, III, Committing EPA's Water Program to Advancing the Watershed Approach (December 3, 2002), *available at* http://www.epa.gov/owow/watershed/memo.html. Part of this approach calls for empowering States to define the watersheds or waterbasins that are to be used as management units. See EPA, Implementing the Guiding Principles through State and Tribal Watershed Approaches, *available at* http://www.epa.gov/owow/watershed/framework/ch6.html. As EPA says, "for large river basins or lakes, state and tribal agencies are likely to lead watershed planning efforts, while local government, conservation districts, and watershed councils may take the lead in developing and implementing solutions in smaller watersheds." *Id.* In this respect EPA's policy, both past and present, is diametrically opposed to the Eleventh Circuit's approach of having different waterbodies defined by federal courts.

We might add that the Eleventh Circuit's decision raises a host of issues that the court appears not to have recognized. Even leaving aside the question of what constitutes a different waterbody (a question, and possibly a complex one, both of law and of hydrology), how is one to know when natural water is polluted enough to become a "pollutant"? Probably the court below intended to require a permit only when the water moved is by some definition "dirtier" than the water in the receiving waterbody. But what if the pumped water is *lower* in pollutants than the receiving water? Under the Eleventh Circuit's reasoning this would still be the "discharge of pollutants" so long as the pumped water had any nonwater molecules in it at all, though we doubt the court intended that result. The effect of the decision below is really to re-write the Clean Water Act, but without the deliberation that accompanies legislative action.

We are told that the S-9 pump discharges have been permitted by the State under the Everglades Forever Act, FLA. STAT. ch. 373.4592(9)(k) & (l) (2002). The permit requires the facility to meet all State water quality standards. Moreover the C-11 Basin and WCA-3A area have been consistently treated as parts of a single system by State and federal regulators and legislatures. It is astonishing that the Eleventh Circuit would decide what is a separate waterbody for regulatory purposes without even considering what State law says about the question, let alone the complex hydrological facts that might be relevant.

## III. THE ELEVENTH CIRCUIT'S INTERPRETATION IS NOT SUPPORTED BY LEGISLATIVE HISTORY OR CONSISTENT WITH OTHER PROVISIONS OF THE CLEAN WATER ACT

As EPA and reviewing courts have recognized, the NPDES program is not the exclusive method by which Congress intended to meet the Act's goals. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). Congress defined the term "pollution"[6] more broadly than the term "discharge of pollutants," and it established separate programs for "nonpoint sources" causing pollution. *See* Clean Water Act §§ 208, 319, 33 U.S.C. §§ 1218, 1329 (1994 & Supp. V 2000). Clearly, it understood that nonpoint sources can have serious water quality consequences.[7] Yet it

[6] Under the Clean Water Act, "pollution" means "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." Clean Water Act § 502(19), 33 U.S.C. § 1362(19) (1994).

[7] Indeed, Congress required States to identify waters that would not meet water quality standards due to nonpoint sources. See Clean Water Act § 319(a)(1)(A), 33 U.S.C. § 1329(a)(1)(A) (1994).



also understood that requiring such sources to get an NPDES permit, with all of the associated effluent limits, monitoring requirements, and liabilities, would be inappropriate or even impossible for some sources. *See Gorsuch*, 693 F.2d at 176.

There is no evidence, either in the legislative history or elsewhere, that Congress would have considered a water transfer like the one in this case a candidate for NPDES regulation. In fact, all the evidence points the other way. The D.C. Circuit, examining the legislative history, found that "[t]hroughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes . . . ." *Id.* at 175.

Even more important, Congress inserted two specific provisions, highly relevant to this question, which the Eleventh Circuit failed to consider. The first is Clean Water Act § 101(g), which reads as follows:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otnerwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Clean Water Act § 101(g), 33 U.S.C. § 1251(g) (1994).[8] Prohibiting the Water Management District from pumping

[8] The legislative history shows that Congress intended to preserve State allocation of water. "The requirements of section 402 and 404 permits may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. *It is the purpose of this amendment to insure that State allocation systems are not subverted,*

water between the C-11 Canal and the WCA-3A area would interfere with the State's authority to allocate water resources—that is, to put water where it is needed and keep it away from places where it is harmful—with disastrous consequences.[9] While the court acknowledged that shutting down the S-9 pump was unwarranted, it seems to have assumed without discussion that the District could solve the problem just by getting a permit.

But the NPDES permit program is particularly unsuited to activities of this kind, for the obvious reason that the Water Management District does not control the "pollutants" in the first place. These pollutants come from other sources in Broward County, which the District cannot anticipate or control. The only factor the District can control is whether or not the pump operates; there is no other place to put the water, which comes to the District in a quantity and quality that it cannot control. How is the District to design a treatment system under these circumstances? What if the point and nonpoint sources that actually contribute the pollutants change over time? What technology should it use? For what pollutants should it plan to treat? For what should it monitor? How are permit limits to be set, and what happens if those limits are exceeded? For the "discharges of pollutants" over which EPA has exercised jurisdiction under the NPDES program, those questions are relatively easy to answer. But when the same questions are asked in this case,

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and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations. This amendment is an attempt to recognize the historic allocation rights contained in State constitutions" (emphasis added). 3 *A Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess. 532 (Oct. 1978) (Senate Debate of Dec. 15, 1977).

[9] Even the Eleventh Circuit agrees that the consequences would be disastrous—so disastrous that it vacated the district court's injunction. *Miccosukee*, 280 F.3d at 1371.



there is no logical answer at all. The only real answer would have the Water Management District build a new water management system that sends the water elsewhere. But that result would violate the policy expressed in § 101(g).

Less than three years ago this Court, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), held that where an administrative interpretation of a statute invokes the outer limits of Congress' power, the Court expects a "clear indication that Congress intended that result." 531 U.S. at 172. Yet here the Eleventh Circuit's decision federalizes the entire corpus of state water resources law and threatens to replace the mechanisms the States have developed for allocating water with the federally imposed NPDES permit program, even though Congress gave no indication at all that that was its intent. The problems of federalism would be severe if, for example, a State authorized a diversion of water but EPA disagreed with the State's decision and vetoed the diversion under Clean Water Act § 402(d)(2), 33 U.S.C. § 1342(d)(2). There is absolutely no indication in the legislative history that Congress intended such a result.

The Eleventh Circuit cited no evidence in the statute or the legislative history that Congress intended to require NPDES permits for the movement of water, and we know of none. It is implausible that Congress would have intended this result, for one simple reason: the way that pollutants are regulated under the NPDES permit program is to impose permit limits, based on what available control technology can accomplish and what is needed to meet instream water quality criteria. For reasons outlined elsewhere in this brief, there is no apparent way to set permit limits for phosphorus, for example, in water that is collected in a canal through a drainage basin, let alone numeric limits for the other "pollutants" that are always present in the same water.

Section 304(f) of the Act also gives clear evidence of Congress' intent that water management activities of this kind be treated as "nonpoint source" "pollution." In pertinent part it provides as follows:

> **§ 1314(f). Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution**
>
> * * *
>
> The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from–
>
> * * *
>
> (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Clean Water Act § 304(f), 33 U.S.C. § 1314(f) (1994).

Although EPA has suggested that § 304(f) does not preclude it from regulating any aspect of an activity that changes water flow or diverts water as a "point source," it has argued that it is a clear indication that Congress intended such activities generally to be treated as nonpoint sources. See *Gorsuch*, 693 F.2d at 168. As discussed above, this is exactly what EPA has done.

The Eleventh Circuit never mentions this clearly rele vant language. The Second Circuit decision on which the



Eleventh Circuit relies for support, *Catskill Mountains*, dismisses both these provisions with almost no discussion on the ground that they are irrelevant in light of the "plain meaning of its text." *Catskill Mountains*, 273 F.3d at 494.

The Power Companies submit that the Eleventh and Second Circuits' interpretation is unsupported by the "plain language" of the statute, inconsistent with prevailing EPA interpretation and applicable precedent, and contradicted by other statutory provisions.

## IV. HOLDING THE WATER MANAGEMENT DISTRICT RESPONSIBLE FOR POLLUTANTS IT CANNOT ANTICIPATE OR CONTROL WOULD VIOLATE DUE PROCESS

To hold the Water Management District (and others similarly situated) responsible for someone else's pollutants, which the District can neither anticipate nor control, would violate the Due Process Clauses of the Fifth and Fourteenth Amendments because the means is not rationally related to the end. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14-15 (1991).

In determining whether a provision holding one party responsible for another's acts has a rational basis, the key is control. For example, a State may hold an innocent employer liable for an employee's fraudulent acts, within the scope of employment, because the State could rationally conclude that such a strict liability rule would make the employer "more likely to prevent an agent's fraud." *Id.* at 14. By contrast, a point source has no power to control what pollutants other sources add, and it likewise cannot control pollutants naturally present in its intake water. Indeed, a discharger cannot even anticipate what pollutants or pollutant levels will appear in its intake water until the water is actually

withdrawn.[10] There is simply nothing a discharger can do that will enable him or her to control what pollutants are introduced by others or by nature.

It was this lack of control that led the court in *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1056 (3d Cir. 1975), *amended on other grounds*, 560 F.2d 589 (1977), *cert. denied*, 435 U.S. 914 (1978), to conclude that "an adjustment [in effluent limitations to account for intake pollutants] would seem required by due process, since without it a plant could be subjected to heavy penalties because of circumstances beyond its control."

In *American Iron & Steel Institute* the steel industry successfully argued that EPA's technology-based regulations were defective because, among other things, they established limitations on a gross, rather than a net, basis. Otherwise, the dischargers argued, they "would be forced to clean up water . . . polluted by other companies." *Id.* at 1056. The court agreed and instructed EPA to revise the rules to "establish precise guidelines" for allowing intake pollutant credits, including the instances when such credits *must* be allowed. *Id.; see also American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034-35 (10th Cir. 1976), *cert. denied*, *Exxon Corp. v. EPA*, 430 U.S. 922 (1977).

The NPDES program's purpose is to "control, on a source by source basis the discharge of pollutants into navigable waters." S. Rep. No. 92-414 at 70 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3736. Holding dischargers liable for pollutants they cannot control is not rationally related to that

[10] Holding a discharger liable for background pollutants would also violate due process in the procedural sense, since dischargers would be responsible for pollutants in intake water whether or not those pollutants were present when its permit limits were established. Dischargers would not have, with respect to such pollutants, the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).



purpose, since it will not result in the control of the actual sources of those pollutants, which have already "added" the pollutant to navigable waters.

The court below found that an NPDES permit is needed to pump impure water into "another distinct body of navigable water." *Miccosukee*, 280 F.3d at 1368. It rejected the Water District's argument to the contrary. *Id.* at 1369 n.8. Yet at the same time the court recognized that without the human improvements both sides of the levees would "essentially be a single body of water." *Id.* In this respect the court's decision is internally inconsistent. Moreover, the complexity of the hydrological question of whether the two sides are one waterbody or two makes it unsuitable for summary judgment, and the court's taking for itself the authority to decide this issue without resort to State water resources law raises serious questions about the State-federal relationship. In such a case the statute should be interpreted to avoid such constitutional issues. *See Solid Waste Agency of Northern Cook Co. v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

## CONCLUSION

The Supreme Court's intervention in this case is much needed. The Eleventh Circuit opinion threatens to change the Clean Water Act from a statute regulating "discharges of pollutants" from "point sources" to a statute regulating water resources generally in a freewheeling, knows-no-bounds fashion, all based on the Random House Dictionary.

The Clean Water Act is not a generalized mandate to regulate all water pollution but a detailed program of specific statutory words. This Court needs to bring the statute back to earth by overturning the Eleventh Circuit's decision in this

case as inconsistent with the wording, legislative history, administrative interpretation, and case law pertaining to the NPDES program.

Respectfully submitted,

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No. 02-626

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

-v.-

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents*.

**On Writ of Certiorari to the**
**United States Court of Appeals for the Eleventh Circuit**

# BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK, THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, THE AMERICAN WATER WORKS ASSOCIATION, AND THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the transfer of untreated water from one natural source to another constitutes an addition of pollutants requiring a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. § 1342 (2003).

## TABLE OF CONTENTS

**Page**

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

INTERESTS OF *AMICI CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 5

TYPICAL BACKGROUND ..... 8

ARGUMENT ..... 11

I. THE NPDES PROGRAM WAS NOT INTENDED TO APPLY TO TRANSFERS AND DIVERSIONS OF UNTREATED WATER FOR PUBLIC PURPOSES. ..... 11

A. The NPDES Program Is Not an Appropriate Mechanism for Regulating Diversions of Water. ..... 12

B. Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water. ..... 14



C. More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water. ..... 15

II. RECENT DECISIONS OF THE FIRST, SECOND AND ELEVENTH CIRCUITS, UNLIKE THE ESTABLISHED DECISIONS OF THE DISTRICT OF COLUMBIA AND SIXTH CIRCUITS, INTERPRET THE TERM "ADDITION" INCORRECTLY ..... 23

III. THE HOLDINGS OF *GORSUCH* AND *CONSUMERS POWER* ARE NOT BASED ON UNDUE DEFERENCE TO USEPA ..... 26

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

**Cases** **Page**

*Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976).....14

Catskill *Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001)..... *passim*

*Catskill Mountains Chapter of Trou: Unlimited, Inc. v. City of New York*, 244 F.Supp.2d 41 (N.D.N.Y. 2003) .....9

*Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).....26, 27

*Christensen v. Harris County*, 529 U.S. 576 (2000) .....26, 27, 28

*Committee to Save Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305 (9th Cir. 1993), *cert. denied sub nom. Members of Cal. Reg'l Water Quality Control Board v. Comm. to Save Mokelumne River*, 513 U.S. 873 (1994).....24

*Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996)..... 11, 24-25

*Miccosukee Tribe of Indians et. al v. South Florida Water Management Dist.*, 280 F.3d 1364 (11th Cir. 2002) ..... *passim*

*National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988) ..... *passim*

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)..... *passim*



*Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003) .....25

*United States v. Law*, 979 F.2d 977 (4th Cir. 1992) .....24

**Statutes and Regulations**

**Federal Statutes**

Rules of the Supreme Court of the United States, 28 U.S.C. Rule 37 (2003).....1

Clean Water Act of 1972, Pub. L. 92-500, 86 Stat. 880 (Oct. 18, 1972) .....5

Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (2003) ..... *passim*

Clean Water Act, 33 U.S.C. § 1251(b) .....26

Clean Water Act, 33 U.S.C. § 1251(g) .....26

Clean Water Act, 33 U.S.C. § 1311(a) .....11, 23

Clean Water Act, 33 U.S.C. § 1313(d) .....16, 17

Clean Water Act, 33 U.S.C. § 1314(f).....7, 14

Clean Water Act, 33 U.S.C. § 1329(a)(1).....16, 17

Clean Water Act, 33 U.S.C. § 1342..... *passim*

Clean Water Act, 33 U.S.C. §1362(12) .....11, 24

Safe Drinking Water Act, 42 U.S.C. § 300(f) *et seq.* (2003).....19, 20, 21

**Federal Regulations**

40 C.F.R. § 122.26 (2003) .....18

40 C.F.R. § 122.32(a)(1) .....18

40 C.F.R. § 122.44(d)(1) .....9, 13

40 C.F.R. § 130.6(c)(4) .....17

40 C.F.R. § 130.7(a) .....17

Surface Water Treatment Rule, 40 C.F.R. § 141.70 *et seq.* (2003).....19, 20, 21

Surface Water Treatment Rule, 40 C.F.R. § 141.171 .....20, 21

**State Statutes**

New York State Environmental Conservation Law § 15-0505 (McKinney 2003) .....22

New York State Environmental Conservation Law § 15-0801 .....22

New York State Environmental Conservation Law § 15-0805 .....22

New York State Environmental Conservation Law § 15-1313(2).....21

New York State Environmental Conservation Law § 15-1501 .....22

New York State Environmental Conservation Law § 17-0301 .....21

New York State Environmental Conservation Law § 17-0501 .....22

**State Regulations**

N.Y. Comp. Codes R. & Regs. tit. 6, Part 670 (2003).....10, 22

N.Y. Comp. Codes R. & Regs. tit. 6, § 700 *et seq.*.....21

N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2.....9



**Other**

http://www.epa.gov/compliance/planning/data/ (last updated April 8, 2003) .....12

USEPA, Fiscal Year 1998 Integrity Act Report to the President and Congress, http://epa.gov/ocfo/integrity/integrity.pdf (last updated December 29, 1998) .....12

http://epa.gov/ocfo/finstatement/2002ar/ar02_goal2 .pdf (last updated January 31, 2003)..... 12-13

http://cfpub.epa.gov/npdes/permitissuance/backlog. cfm (last updated July 15, 2003).....13

http://epa.gov/npdes/images/permit_backlog.gif. .....13

http:www.epa.gov/ocfo/plan/2003goal2.pdf (last updated March 5, 2003) .....13

http://cfpub.epa.gov/npdes/home.cfm? program_id=6 (last updated June 26, 2002) .....18

http://www.dec.state.ny.us/website/dow/ MS4Permit.pdf (last modified January 8, 2003).....19

## INTERESTS OF *AMICI CURIAE*

*Amici curiae* submit this brief in support of petitioner South Florida Water Management District seeking reversal of the lower court's decision in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District,* 280 F.3d 1364 (11th Cir. 2002).[1]

*Amici* represent local governments, public utilities, water suppliers, and local water management agencies. *Amici* all have direct roles in ensuring clean and safe water in our country. However, *amici* also have an interest in ensuring that their activities are regulated with suitable laws, and believe that the Eleventh Circuit's erroneous decision interferes with appropriate local water management.

Transfers and diversions of untreated water are essential to the design and operation of public water supply systems, municipal and regional flood control and water management efforts, and structures designed to assist in inland navigation. All surface water supply systems involving more than a single source rely fundamentally on local governments' ability to move water from one source to another to meet local water supply and safety needs. Countless water management systems throughout the

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. The parties' counsel have consented to the filing of this brief, and letters reflecting that consent are submitted to the clerk's office with this brief.

country transfer water to areas that need water or away from areas in danger of flooding. Operation of canals, locks, and dams involves movement of water from one body – whether natural or constructed – to others. *Amici* support petitioner's request that the Court reverse the Eleventh Circuit Court of Appeals' decision because it threatens the operation of all such systems and is inconsistent with the language and intent of the Clean Water Act.

*Amici* are troubled by the Eleventh Circuit's decision and the earlier Second Circuit decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001), on which the Eleventh Circuit relied, because they dramatically change the regulatory structure for local governments and other water managers by holding that transfers of natural water, in the context of routine water management activities, require Clean Water Act permits (National Pollutant Discharge Elimination System, or NPDES, permits). Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments and public utilities for ordinary management of water, for public water supply, flood control, navigation, and other governmental and public purposes, currently operates pursuant to such a federal permit. Based on the numerous water management structures that predate the enactment of the Clean Water Act in 1972, it was clear to Congress when the statute was developed that the nation depended on such facilities. There is no indication in the language or history of the Clean Water Act that Congress intended to interfere with these basic structures' functions, which are now threatened by the Eleventh Circuit's holding. The statute was comprehensively amended in 1987 and has been amended several times since. At no time has Congress given any indication that it believed the



NPDES program should apply to these water management structures.

*Amicus* the City of New York (the City), a political subdivision of the State of New York, owns and operates a water supply system that provides water of excellent quality to some nine million residents of the City and State of New York. The City's water supply system depends on transfers of natural, untreated water from each reservoir downstream to the next. As discussed below, the City's ability to supply sufficient water to fulfill its demand is threatened by the Second Circuit's decision in *Catskill Mountains*. In addition, as a result of that decision, the City has already been assessed over $5.7 million in past penalties for operating a water supply facility that has been on line for nearly eighty years.

The Association of Metropolitan Water Agencies (AMWA) represents the nation's largest publicly-owned municipal drinking water suppliers. AMWA's 168 members include agencies and divisions of city governments, and special purpose commissions, districts, agencies and authorities created under state law to supply drinking water to the public. AMWA's members provide drinking water to over 110 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another.

The National Association of Flood and Stormwater Management Agencies (NAFSMA), established in 1979,

represents more than 100 local and state flood control and stormwater management agencies. NAFSMA members are public agencies whose function is the protection of lives, property and economic activity from the adverse impacts of storm and flood waters. NAFSMA member activities are also focused on the improvement of the health and quality of our nation's waters. The mission of the association is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance the achievement of the public service functions of its members. NAFSMA is concerned that routine flood management activities would require NPDES permits under the Circuit Court's decision.

The American Water Works Association (AWWA) is an international, nonprofit, scientific and educational society dedicated to the improvement of drinking water quality and supply. Founded in 1881, the Association is the largest organization of water supply professionals in the world. AWWA's 57,000-plus members are leaders in water quality analysis, technology development, treatment and distribution of drinking water, water management, and water use. Its members represent the full spectrum of the drinking water community, including utility managers, plant operators, environmental advocates, state and federal regulators, scientists, academicians, and others who hold a genuine interest in water supply and public health. AWWA's membership includes approximately 4,800 local or regional drinking water utilities, which collectively provide safe drinking water to more than 80 percent of the American people.

The Association of Metropolitan Sewerage Agencies (AMSA) represents the nation's publicly-owned wastewater treatment agencies (POTWs). AMSA's nearly 300 member agencies provide the majority of the U.S.



population with reliable sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. AMSA members operate their POTWs under the Clean Water Act's NPDES permitting program. AMSA members are concerned, however, that the Eleventh Circuit's decision unnecessarily will subject new aspects of their operations to NPDES permitting for the first time.

## SUMMARY OF ARGUMENT

This case is of great importance to the nation's municipal water management agencies. The ruling of the Eleventh Circuit, if not overturned, will burden tens of thousands of water authorities and municipal water departments and agencies with unnecessary, and in many cases unattainable, regulatory requirements. In perhaps the majority of cases, local water management agencies will be unable to obtain or comply with NPDES permits for facilities that are essential to many public uses, including flood control, ensuring a reliable supply of water for domestic, commercial, and industrial uses, and fire suppression. Where it is possible to comply with permit terms and conditions, the cost of doing so is incalculable. The harm to the public will be enormous and direct if the Eleventh Circuit decision is upheld, while in most cases the decision will not lead to any measurable environmental benefit.

Municipal and regional water management systems existed in the United States for decades before the enactment of the Clean Water Act in 1972. Pub. L. 92-500, 86 Stat. 880 (Oct. 18, 1972). These systems are designed to move water from one natural body to another, or to change the flow of water. During the 30 years since its enactment, the Clean Water Act has never, until recently, been interpreted to regulate such transfers and diversions of

natural, untreated water. The United States Environmental Protection Agency (EPA) has never required that such transfers and diversions operate pursuant to Clean Water Act NPDES permits. Similarly, none of the more than 40 states with delegated authority to administer the Clean Water Act permit program by EPA has historically required Clean Water Act permits for these water transfers and diversions. As demonstrated in this brief, the NPDES program is the wrong tool for regulating water transfers and diversions. The consequences of requiring NPDES permits for such activities could be devastating to water suppliers, local governmental water managers, and the citizens they serve every day across the nation.

*Amici* emphasize that at the core, our fundamental interest is in protecting our nation's waters. We and our member organizations, governments, and utilities are all engaged in activities intended to protect, treat, reclaim, and otherwise improve water quality. In arguing that the NPDES program is not the appropriate mechanism for regulating transfers and diversions of untreated water, we do not suggest that such transfers and diversions should not be subject to regulation. However, as discussed below, there are numerous existing provisions in both federal and state law that were designed to assure that water transfers and diversions are managed in ways that avoid pollution. In most cases, these other provisions can regulate transfers and diversions more appropriately and effectively than the ill-suited NPDES program. We believe that proper use of these existing measures will address the fundamental concerns of respondents in this case and avoid the significant problems created by the appellate courts' recent attempts to apply the NPDES program to these water transfers in a new way, far outside the program's intended scope.



Indeed, in promulgating the Clean Water Act itself, Congress established a separate provision – independent of the NPDES program – that specifically addresses water transfers and diversions. Congress directed EPA to develop "processes, procedures, and methods to control pollution resulting from … changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F). This provision makes clear that Congress recognized that flow diversion facilities should be treated differently from facilities subject to NPDES permits.

This provision shows that Congress recognized the need for flexibility in regulating water diversions to ensure that water management for such purposes as water supply, flood control, and navigation was not unreasonably restricted simply because of naturally occurring water quality conditions. In contrast, the NPDES program places significant pollutant removal responsibilities on the operators of permitted facilities to assure compliance with water quality standards. Where the water manager is simply moving water, without introducing pollutants, requiring NPDES permits may have the anomalous effect of essentially requiring treatment of natural water.

Moreover, requiring flow diversions to receive NPDES permits will overwhelm the already under-resourced NPDES permit program. Over the past 30 years, EPA and the NPDES-delegated states combined have issued some 135,000 Clean Water Act permits for existing discharges. If, as the Eleventh Circuit's decision in *Miccosukee* suggests, the over two million dams and diversion structures across the nation require NPDES permits, a fundamental restructuring of the administration

of such permits-far beyond what Congress envisioned when it created the NPDES program-unquestionably will be required.

## TYPICAL BACKGROUND

The facts of the *Catskill Mountains* case provide an example of the types of diversions and transfers frequently undertaken by municipal and regional water management agencies for water supply, flood control, and other local water management purposes. We thus describe the facts in *Catskill Mountains* in some detail to illustrate the types of facilities currently operating today throughout the United States without NPDES permits.

New York City owns and operates a water supply system in upstate New York. The Shandaken Tunnel transfers water from the Schoharie reservoir, one of the two reservoirs that comprise New York City's Catskill water supply system, to the other, the Ashokan reservoir. Specifically, the Tunnel moves water from the Schoharie reservoir to the Esopus Creek, the main tributary to the Ashokan. New York City's average demand for water is about 1.2 billion gallons per day, of which the Catskill system generally provides about 40%. Approximately 40% of the Catskill supply, or 16% of New York City's drinking water, originates in the Schoharie reservoir. The Ashokan reservoir went into service in 1915. The Shandaken Tunnel and the Schoharie reservoir were both on line by 1926.

New York City does not treat water collected in the Schoharie reservoir before diverting it through the Shandaken Tunnel. However, the mountains surrounding the Schoharie reservoir are characterized by extensive deposits of silts and clays, which are often exposed by erosion, particularly during storms. As a result, water from the Schoharie reservoir that is released from the Tunnel



regularly contains elevated levels of suspended solids, and thus turbidity. Extensive research and analysis indicate that even with reasonable structural and programmatic measures in place, the releases from the Shandaken Tunnel regularly will continue to be visibly more turbid than the receiving water, the Esopus Creek.

Clean Water Act permits must include effluent limits to "achieve water quality standards ... including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1) (2003). The state water quality standard for discharges of turbid waters in New York is: "no increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2 (2003). Because there may not be a practicable way to ensure that water released from the Shandaken Tunnel is never more turbid than the receiving waters, it is possible that New York City will be unable to obtain a Clean Water Act permit for its transfer of water through the Tunnel. Under the reasoning of the Eleventh Circuit, which adopted that of the Second Circuit in *Catskill Mountains*, New York City is in violation of the Clean Water Act every time it transfers water through the Tunnel.[2] This could lead to a prohibition against New York City's continued use of this source of approximately 16% of its water supply, jeopardizing the City's ability to ensure an adequate supply of water to meet its daily demand.

Similarly, if the Eleventh Circuit's decision is left to stand, the myriad water management facilities involved in analogous diversions and transfers of natural, untreated water for water supply and flood control purposes

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[2] Indeed, in the *Catskill Mountains* case, on remand, the District Court assessed the City over $5.7 million in penalties for past violations. 244 F. Supp. 2d 41 (N.D.N.Y. 2003).

(including other portions of New York City's water supply system) face a similar impossible dilemma: either to be subject to continual enforcement actions under the Clean Water Act, potentially involving extensive civil and even criminal penalties, or to be required to cease fundamental public water supply and water management activities.

Moreover, it is not always simple to assess the overall impacts of water management activities. In many cases, historic diversions or transfers of natural, untreated water are now vital to sustaining a healthy aquatic environment in the receiving water body. For instance, the generally cold water from the Shandaken Tunnel is essential to maintaining the exceptional trout fishery in the Esopus Creek, especially during the summer when temperatures in the Creek rise and "natural" flow (without the Tunnel's contribution) is diminished.[3] If the reasoning of the Second and Eleventh Circuits is upheld, operators of water supply or flood control infrastructure may be forced to alter or even eliminate diversions or transfers of water in order to avoid liability under the Clean Water Act. The result in many cases will be a net detriment to ecosystems that have come to depend on such diverted flows. Such a result runs counter to the goals of the Clean Water Act.

The biochemical constituents of distinct, untreated bodies of water will be different from one to another, whether the water bodies are in naturally connected watersheds or not. Thus, diversions or transfers of untreated water are likely to involve transfers of water

[3] Indeed, as noted below, New York State requires the City to release specified volumes of water from the Shandaken Tunnel pursuant to its authority to protect natural resources and recreational use of water. N.Y. Comp. Codes R. & Regs. tit. 6, Part 670 (2003).



containing different constituents, and constituents in different concentrations, than may occur in the receiving waters, such as turbidity in the *Catskill Mountains* case or the nutrients at issue in *Miccosukee*. For the reasons set forth herein, however, *amici* urge this Court to find that such incidental movement of the natural constituents of untreated water are not "additions" of pollutants requiring NPDES permits under the Clean Water Act.

## ARGUMENT

The Clean Water Act provides that unless a discharge permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. A NPDES permit is required when (1) a pollutant is (2) added (3) to navigable waters (4) from (5) a point source. 33 U.S.C. §§ 1311(a), 1342, 1362(12); *see also National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988). In *Miccosukee, Catskill Mountains*, and *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), Courts of Appeals have abandoned an established line of appellate cases and have determined that a transfer of untreated water can be an "addition" under the Clean Water Act. This interpretation was wrong for a number of reasons.

### I

### THE NPDES PROGRAM WAS NOT INTENDED TO APPLY TO TRANSFERS AND DIVERSIONS OF UNTREATED WATER FOR PUBLIC PURPOSES.

Because the NPDES program lacks both the administrative capacity and the regulatory flexibility necessary to deal appropriately with transfers and

diversions of natural, untreated water, *Miccosukee* and similar decisions like *Catskill Mountains* compromise the continued operation of water supply and management systems across the nation. There are numerous federal and state laws that more appropriately and effectively regulate water transfers and diversions than the NPDES provisions of the Clean Water Act.

### A. The NPDES Program Is Not an Appropriate Mechanism for Regulating Diversions of Water.

The recent appellate decisions at issue here threaten the continued operations of certain facilities that are vital for water supply, local government water management, flood control, and navigation. These decisions run counter to Congress' intent that states and local governments retain primary control over local water management decisions.

If these decisions are not reversed, the scope of the Clean Water Act's NPDES permit program will far exceed the capacities of EPA and states with delegated authority to administer the program. According to EPA, "more than 135,000 facilities nationwide" currently have NPDES permits. *See* http://www.epa.gov/compliance/planning/data/ (last updated April 8, 2003). Even with the current universe of permitted entities, EPA and the delegated states have not been able to administer the NPDES program in accordance with the statutory requirement that NPDES permits be issued for no more than five years. *See* 33 U.S.C. § 1342(b)(1)(B). In fact, in December 1998, EPA identified NPDES permit backlog as a "material weakness" at the Agency. *See* USEPA, Fiscal Year 1998 Integrity Act Report to the President and Congress, http://epa.gov/ocfo/integrity/integrity.pdf at B-3 (last updated December 29, 1998). The deficiency has not been cured as of the Fiscal Year 2002 Report. *See* http://epa.gov/ocfo/



finstatement/2002ar/ar02_goal2.pdf (last updated January 31, 2003). EPA has established a goal of reducing the backlog of all permits to 10 percent by the end of 2004. *See* http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm (last updated July 15, 2003). As of March 31, 2003, 18 percent of the approximately 116,000 NPDES permits analyzed had expired. *See* http://epa.gov/npdes/images/permit_backlog.gif. EPA's draft Strategic Plan for 2003-2008 includes reducing the NPDES permit backlog as a key Clean Water Act goal. *See* http:www.epa.gov/ocfo/plan/2003goal2.pdf (last updated March 5, 2003).

Under *Miccosukee* and *Catskill Mountains*, more than two million dams, and countless other diversion structures, across the nation currently operating without NPDES permits will be added to the backlogged and overburdened NPDES program. *See, e.g., National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 182 (D.C. Cir. 1982). In light of the manifest administrative problems with the NPDES program today, a 15-fold increase in the number of entities requiring Clean Water Act permits would without question overwhelm permitting agencies across the nation. The scope of the NPDES program under *Miccosukee* is an order of magnitude greater than either Congress or EPA has envisioned in the more than 30 years since the Clean Water Act took effect.

Moreover, because NPDES permits must include effluent limits to "achieve water quality standards ... including State narrative criteria for water quality," 40 C.F.R. § 122.44(d)(1), the NPDES program lacks the flexibility to deal appropriately with transfers of untreated water. Where the transferred water contains pollutants that are not introduced by the entity operating the transfer, as in *Miccosukee* (where the water contains phosphorus from urban runoff) and *Catskill Mountains* (where the water

contains naturally occurring turbidity), this requirement can place an impossible burden on the transferor.[4] The *Catskill Mountains* case is illustrative. As noted above, there may be no feasible mechanism for ensuring that Schoharie water released from the Shandaken Tunnel meets the New York State water quality standard of no substantial visible increase in turbidity. If the City proves to be unable to obtain a NPDES permit and this Court does not reverse the decisions of the Eleventh and Second Circuits, 16% of the City's water supply may be in jeopardy.

**B. Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water.**

Under the Clean Water Act, Congress directed EPA to study and make recommendations concerning "changes in the movement, flow, or circulation" of navigable waters, including those caused by "flow diversion facilities," in one of several statutory provisions addressing nonpoint sources of pollution. 33 U.S.C. § 1314(f)(2)(F). In recommending consultation with appropriate Federal and State agencies on processes and methods to control pollution resulting from flow diversion facilities, including dams and levees, 33 U.S.C. § 1314(f), Congress clearly contemplated that facilities that change the flow of water would be evaluated differently from point sources of pollutants. *See Consumers Power*, 862 F.2d at 588 ("This supports … the

[4] Moreover, this burden is unfair. The Clean Water Act was intended to regulate entities that *introduce* pollutants, not entities that merely move water that already contains pollutants. *See, e.g., Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377-78 (4th Cir. 1976) (Clean Water Act does not make industrial dischargers responsible for removing constituents occurring naturally in intake water or introduced by upstream discharges).



view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under 'nonpoint source' category of pollution") (*citing Gorsuch*, 693 F.2d at 177).

In other words, while Congress clearly contemplated that pollutants might be moved within the nation's waters as a result of facilities diverting flow, like the S-9 pumps and the Shandaken Tunnel, the Clean Water Act is structured to address transfers of pollutants resulting from such diversions in a different manner from additions subject to the NPDES permitting requirements of 33 U.S.C. § 1342.

**C. More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water.**

In urging rejection of the NPDES program as the tool to manage the incidental water quality impacts of myriad water movement structures such as the S-9 pumps at issue in *Miccosukee*, *amici* do not suggest that such structures should not be evaluated and regulated to address water quality impacts. Rather, we ask the Court to recognize that many other provisions of federal and state law provide sufficient, and in fact more appropriate, regulatory frameworks to address any water quality impacts of transfers of untreated water. The following section provides examples of such other provisions.

## 1. Federal Programs

### a. Total Maximum Daily Loads and State Water Quality Management Plans

In most cases, a receiving water that fails to meet applicable water quality standards for a particular pollutant will be placed on the state's impaired waters list under the Clean Water Act and therefore subject to the development of total maximum daily loads (TMDL). 33 U.S.C. § 1313(d). TMDLs are a management tool for identifying sources of pollutants of concern and for allocating those pollutants to their various contributors. TMDLs are implemented for point sources via NPDES permits and for nonpoint sources through state best management practices.

The TMDL program, in contrast to the NPDES permitting program, is an appropriate means to assess ways to regulate and control pollutants in the water bodies at issue in both *Miccosukee* and *Catskill Mountains*, because, in both cases, the pollutants are generally added by nonpoint sources, and the TMDL program, unlike the NPDES program, considers the relative constituents of both point and nonpoint sources of pollution, as well as a "margin of safety" to protect water quality and account for any uncertainties.

In addition to the TMDL program, states must establish Water Quality Management (WQM) Plans to address water bodies for which water quality standards cannot be attained or maintained without the control of nonpoint sources. 33 U.S.C. § 1329(a)(1)(A). A WQM Plan "identifies those categories and subcategories of nonpoint sources, or, where appropriate, particular nonpoint sources which add significant pollution ... in amounts which contribute" to the failure to meet water quality standards. 33 U.S.C. § 1329(a)(1)(B). A WQM



Plan includes a process for identifying best management practices to reduce pollution from the significant individual nonpoint sources or categories of sources, and describes the programs that have been implemented to control pollution from those sources. 33 U.S.C. §§ 1329(a)(1)(C) and (D). A WQM Plan includes both regulatory and non-regulatory means to control nonpoint source pollution. 40 C.F.R. §§ 130.6(c)(4)(i) and (ii) (2003). Moreover, the TMDLs that are established under 33 U.S.C. § 1313(d) are incorporated into a state's WQM Plan. 40 C.F.R. § 130.7(a).

The major source of the pollutant at issue in *Miccosukee,* phosphorus, generally originates from nonpoint sources. Similarly, in *Catskill Mountains*, the turbidity and suspended solids of concern enter the Schoharie Reservoir mainly through nonpoint sources, and result from both the natural conditions in the Schoharie watershed and human activity, such as farming, logging, development and disturbances to streambanks and streambeds. The appropriate place to address the pollutants in both cases is where they enter the water. The means to address them are the Clean Water Act's nonpoint source programs, including the TMDL program and state WQM plans.

Regulators, environmental advocates, and the scientific community continually stress that it is far more effective to address pollutants at their source than to try to remove them, or compensate for their impacts, after they have been added to the nation's waters. The decisions in *Miccosukee* and *Catskill Mountains* run counter to this fundamental principle by endorsing an impractical approach, seeking to address pollutants at the wrong end of the conveyance. By attempting to address pollutants when water is transferred rather than when the pollutants are

introduced-after the fact rather than at their sources-the Eleventh and Second Circuits have failed to solve the actual environmental problem–reducing pollution in the nation's waters.

**b. Municipal Separate Storm Sewer System Permits**

The NPDES program itself includes provisions that are better tailored to addressing pollutants originating in urban runoff, such as those at issue in *Miccosukee*, than requiring individual NPDES permits for the transfers of water containing such pollutants.[5] Under the stormwater provisions of the Clean Water Act, EPA has established permit programs to protect water quality by reducing the pollutants in stormwater runoff from municipalities and other populated areas – initially for areas with populations of 100,000 or greater[6] (the Phase I Program, implemented in the early 1990s) and more recently for areas designated as "urbanized" by the latest census[7] (the Phase II Program, implemented earlier this year).

Municipalities required to obtain permits for their municipal separate storm sewer systems (MS4s) are required to implement best management practices to reduce

[5] Many stormwater discharges are regulated as "point sources" under the NPDES program because stormwater from activities most likely to cause pollution is typically controlled by storm sewers or other stormwater management systems with controlled discharge points. *See, e.g.*, http://cfpub.epa.gov/npdes/home.cfm?program_id=6 (last updated June 26, 2002).

[6] *See* 33 U.S.C. § 1342(p)(2); 40 C.F.R. § 122.26.

[7] *See* 33 U.S.C. § 1342(p)(6); 40 C.F.R. § 122.32(a)(1).



stormwater pollutants to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii).[8]

Thus, to the extent that the pollutants of concern in a water transfer or diversion come from urban stormwater runoff, the MS4 permit program as well as nonpoint source best management practices can appropriately address the pollutants at their sources. The Eleventh Circuit's decision, in contrast, would instead regulate such pollutants once they are already in the waters of the United States, essentially requiring water transfer facilities to "treat" these pollutants in the course of diverting, pumping, or moving the water. This indirect and impractical approach to addressing the underlying water quality concern places regulation at the wrong location, and may place pollutant removal responsibilities on the wrong parties.

**c. The Safe Drinking Water Act and Surface Water Treatment Rule**

Municipal water supply systems are closely regulated under the federal Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(f) *et seq.*, and its implementing regulations, the Surface Water Treatment Rule (SWTR), 40 C.F.R. § 141.70 *et seq.* The SDWA and SWTR, among other things, set the maximum level of contaminants that are allowed in public water systems, and set forth the

[8] New York State law goes even further than the Clean Water Act, requiring MS4s to "take all necessary actions to ensure future discharges do not cause or contribute to the violation of a water quality standard." New York State Department of Environmental Conservation SPDES General Permit for Stormwater Discharges from Municipal Separate Stormwater Sewer Systems, Permit No. GP-02-02, http://www.dec.state.ny.us/website/dow/MS4Permit.pdf, at 9 (last modified January 8, 2003).

criteria that must be met for a public water system to avoid filtration. *See* 40 C.F.R §§ 141.70 and 141.71. As part of the criteria to avoid filtration, the SWTR limits turbidity to 5 NTU immediately prior to the first point of disinfection. 40 C.F.R. § 141.71(a)(2).

The facts of the *Catskill Mountains* case again provide an example of how water transfers are already appropriately reviewed, managed, and regulated. New York City's Catskill system supplies unfiltered water to the City of New York, and thus operates under a Filtration Avoidance Determination (FAD) issued by the EPA under 40 C.F.R. §§ 141.71 and 141.171. The City's most recent FAD, which was issued in November 2002, contains several provisions that require the City to address and control pollution entering the City's Catskill and Delaware water supply systems from both point and nonpoint sources. The FAD specifically requires the City to address suspended solids and turbidity entering the source waters of the Schoharie Reservoir. The requirements include a stream management program to restore streambanks and streambeds, an agricultural program to reduce pollution from farms near the watershed, and a forestry program to address erosion resulting from logging. Most importantly, the FAD requires the City to study and implement any feasible, effective and cost-effective means to reduce turbidity in waters released through the Shandaken Tunnel.

Thus, the pollutants at issue in *Catskill Mountains* are being addressed under the SDWA and SWTR, both at the location where they enter the water system and after water is released through the Shandaken Tunnel. The FAD program administered under the SDWA and SWTR not only imposes more effective environmental controls than the NPDES permitting program, it also resolves the underlying issues without losing sight of the fact that the



main purpose of the Catskill system is to provide a safe and adequate supply of drinking water to the public. Because the entire supply system, including the Shandaken Tunnel, is effectively regulated under the SDWA and SWTR, it should not be subjected to the intransigence and inflexibility of the NPDES point source permitting program which, if applied to the City's water supply system, will jeopardize the City's ability to provide a safe supply of water to the nine million residents, and countless commercial users and workers, who rely on it. While the specific source control measures in New York City's FAD would not be required of filtered public water systems under the SDWA, many filtered systems throughout the country employ similar measures under state or local law or regulation.

**2. State Laws and Regulations**

As noted above, in addition to the federal requirements, a number of state laws and regulations address and control pollutants in the context of municipal water management and water transfers. We describe regulatory programs in New York as illustrative of the types of programs that exist throughout the nation. These provisions operate independently from the NPDES program.

Consistent with its delegated authority to administer the Clean Water Act, New York State has adopted and enforces water quality standards. *See* New York State Environmental Conservation Law (ECL) § 15-1313(2) (McKinney 2003); *see also* ECL § 17-0301, N.Y. Comp. Codes R. & Regs. tit. 6, § 700 *et seq*. The State classifies bodies of water in accordance with their best use, and adopts and enforces water quality standards for specific water bodies, including the Esopus Creek, based on those

classifications. *See id.* Releases that violate the state water quality standards are subject to enforcement by the Commissioner of the New York State Department of Environmental Conservation. ECL § 17-0501. Releases from the Shandaken Tunnel are subject to these provisions, independent of the NPDES or New York's State Pollutant Discharge Elimination System (SPDES) program.

New York State law also prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. ECL § 15-1501. Under another provision, a permit is required to excavate or place fill in navigable waters. ECL § 15-0505. These laws, if enforced properly, are specifically tailored to address many of the activities that create turbidity in source waters of the Schoharie reservoir, and thus in releases from the Shandaken Tunnel.

Finally, New York State regulates releases from reservoirs in order to protect natural resources and recreational uses in the receiving waters. ECL §§ 15-0801 and 15-0805.[9] Again, *amici* urge this Court to consider that applying the NPDES permit program to water transfers and diversions will only further complicate and burden these local water management activities, contrary to Congress' intent and in many cases, unnecessarily duplicate existing state requirements.

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[9] Indeed, New York City is required, under regulations promulgated by New York State pursuant to these statutes, to make releases from its Shandaken Tunnel, to enhance recreational use of the Esopus Creek. N.Y. Comp. Codes R. & Regs. tit. 6, Part 670.



## II

## RECENT DECISIONS OF THE FIRST, SECOND AND ELEVENTH CIRCUITS, UNLIKE THE ESTABLISHED DECISIONS OF THE DISTRICT OF COLUMBIA AND SIXTH CIRCUITS, INTERPRET THE TERM "ADDITION" INCORRECTLY.

The transfers or movement of natural, untreated water is not an "addition" of pollutants under the Clean Water Act. In holding that the release of natural, untreated water is governed by the Clean Water Act's permitting requirements as set forth in 33 U.S.C. §§ 1311(a) and 1342, the *Miccosukee* court, as well as the First and Second Circuits, departed from the longstanding interpretation of the term "addition" adopted by District of Columbia and Sixth Circuits in the 1980s. No case law prior to 1996 supports the proposition that the mere diversion or transfer of untreated water, from one water body to another, is, in and of itself, an "addition" of pollutants requiring a Clean Water Act permit. These prior Clean Water Act cases all held that more than a mere diversion of flow from one body to another is necessary to constitute an "addition" - pollutants must be "added" or introduced at the point source itself.

In *Gorsuch*, 693 F.2d at 164, the District of Columbia Circuit Court addressed whether dam-induced water quality changes are "addition[s] that trigger the NPDES permit requirement." The Court agreed with EPA that they were not, because a pollutant was not physically introduced "into the water from the outside world." *Id.* at 175. Once a pollutant already exists in navigable water, transferring that water from one body of navigable water to

another does not "add" the pollutant. Similarly, in *Consumers Power*, the Sixth Circuit held that the release of fish and fish parts from a hydroelectric plant downstream from the source of the intake water did not constitute an "addition" because the plant simply moved those pollutants already in the water. Other courts have recognized that an addition does not occur where pollution is merely passed "from one body of navigable water to another."[10] *See, e.g., Committee to Save Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied sub nom. Members of Cal. Reg'l Water Quality Control Board v. Comm. to Save Mokelumne River*, 513 U.S. 873 (1994).

In contrast, the Eleventh Circuit held in *Miccosukee* that the South Florida Water Management District needed a NPDES permit to move water over a levee for flood control and water supply purposes. This "mere diversion in the flow of waters" is not the type of activity that Congress intended to cover in the NPDES program. *See United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("Where 'pollutants' exist[] in the waters of the United States before contact with these facilities, the mere diversion in the flow of the waters [does] not constitute 'additions' of pollutants to the water"). The Eleventh Circuit followed the Second Circuit decision in *Catskill Mountains*, concerning the releases of untreated water from New York City's Shandaken Tunnel, and the First Circuit decision in *Dubois*

[10] This is consistent with the language of the statute, which refers to the addition of a pollutant to navigable "waters" rather than to navigable "water." 33 U.S.C. § 1362(12). The use of the collective term "waters" suggests that an "addition" requiring a permit would be an addition to the system of navigable waters as a whole, rather than the incidental transfer of pollutants from one body of water to another.



*v. U.S. Dep't of Agric.*, a case involving a private company's diverting water from a pond and two other sources to create snow for skiing, and then returning the water to the pond. 280 F.3d at 1369, n.7.[11]

[11] Subsequent to the Eleventh Circuit decision in *Miccosukee*, the Ninth Circuit held that the release of groundwater pumped during the process of mining into surface waters required a NPDES permit. *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003). *Dubois* and *Northern Plains Resource Council* are distinguishable from *Miccosukee* and *Catskill Mountains*.

*Amici* represent cities and other public entities engaged in water supply, flood control, and other water management activities. In contrast to the activities of the defendants in *Miccosukee* and *Catskill Mountains*, as well as those of other *amici*, *Dubois* defendant Loon Mountain Recreation Corporation was processing the diverted water through snowmaking equipment and *Northern Plains* defendant Fidelity Exploration and Development Company was extracting groundwater in connection with mining operations.

The First Circuit found it significant in *Dubois* that the water was "commercially exploited" between the time of its intake into the snowmaking equipment and the time it was released. 102 F.3d at 1297. The commercial exploitation meant that water was removed from the waters of the United States, and then was released into the waters of the United States after it was processed in the snowmaking equipment. *Id.*

The underlying water discharge in *Northern Plains* is even more distinct from the transfers at issue in *Miccosukee* and *Catskill Mountains*. In determining that groundwater was a "pollutant" in *Northern Plains*, the Ninth Circuit emphasized that, because defendant was engaged in commercial activity, the groundwater qualified as "industrial waste." 325 F.3d at 1161.

The Eleventh Circuit (and the First and Second Circuits before it) departed from the well-reasoned principle, established in *Gorsuch* and *Consumers Power*, that more than a mere diversion of flow is necessary to constitute an "addition" under the Clean Water Act. The First, Second, and Eleventh Circuits' decision to extend the reach of the NPDES program was irrational and contrary to the language and purpose of the Act.

## III

## THE HOLDINGS OF *GORSUCH* AND *CONSUMERS POWER* ARE NOT BASED ON UNDUE DEFERENCE TO USEPA.

In its attempt to reconcile *Gorsuch* and *Consumers Power* with its decision in this case, the Eleventh Circuit noted that the District of Columbia and Sixth Circuits in those earlier cases may have accorded EPA's interpretation of "addition" undue deference, since they were decided under the standard of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 280 F.3d at 1368, n.5. The Eleventh Circuit relied upon *Christensen v. Harris County*, 529 U.S. 576 (2000) for the proposition that EPA's interpretation is entitled to only a limited degree of deference, rather than great deference, because its interpretation was not subjected to the rigors of notice and comment rulemaking.

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Distinguishing between governmental water management activities and commercial exploitation of water is consistent with the goals and policy of the Clean Water Act. 33 U.S.C. §§ 1251(b) and (g).



Although in *Gorsuch*, the District of Columbia Circuit Court of Appeals stated that the EPA interpretation was entitled to "great deference" (*Gorsuch*, 693 F.2d at 170), the decision itself demonstrates that the court did not simply defer to EPA. Rather, it contains a detailed analysis of the specific language of the Clean Water Act and its legislative history, as well as an evaluation of policy, weighing the interests of preserving the integrity of the waters of the United States against the interests of states in water management. Instead of giving undue deference to the EPA interpretation, the *Gorsuch* court labored to ensure that it evaluated the competing interests of the Clean Water Act against local water management issues. Thus, *Gorsuch* is consistent with the *Christensen* standard of deference because the court gave deference to the EPA position, but only to the extent that it was persuaded that EPA's position was consistent with its analysis of the language, legislative history, and policy behind the Clean Water Act.

Because the *Gorsuch* court did not simply defer to the EPA interpretation of the Clean Water Act, *Christensen* does not support the Eleventh Circuit's departure from the principle that the mere transfer of untreated water that naturally contains pollutants is not regulated by the Clean Water Act. Similarly, in *Consumers Power*, while it discussed EPA's position in light of the then-applicable *Chevron* standard, the Sixth Circuit relied on a detailed analysis of congressional intent in reaching its decision that transfers of water from a dam used as a hydroelectric facility were not "additions" under the Clean Water Act. 862 F.2d at 586-88.

In contrast to the District of Columbia and Sixth Circuit Courts of Appeals, which considered several factors in addition to the EPA interpretation, the Eleventh Circuit did not conduct such a detailed analysis. Rather, it used

*Christensen* to support its departure from the long line of cases interpreting the Clean Water Act, without any consideration of the legislative history or weighing of interests.[12] For the reasons discussed above, *amici* urge the

[12] The Second and Eleventh Circuits assumed that confining water in a dam or reservoir, and then releasing that water, is fundamentally different from diverting water so that it flows from one body into another. In *Catskill Mountains*, the Second Circuit distinguished *Gorsuch* and *Consumers Power* on the theory that in those situations, unlike the discharges from New York City's Shandaken Tunnel, "the water from which the discharges came [in those cases] is the same as that to which they go." 273 F.3d at 492. Similarly, in *Miccosukee*, the Eleventh Circuit found this distinction between inter-basin and intra-basin transfers significant: "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." 280 F.3d at 1368-69. There is no language in the Clean Water Act, however, that suggests that the question of whether a transfer of untreated water requires a NPDES permit turns on whether the transfer of water is within the same basin or between separate basins.

Deciding whether the NPDES program applies based on the distinction between inter- and intra-basin transfers, rather than on whether pollutants are in fact being introduced to the nation's waters, reflects a fundamental misunderstanding of the Clean Water Act. The Second Circuit concluded that confining water in a dam or reservoir, and then releasing that water, is so fundamentally different from diverting water so that it flows from one body into another that the latter requires a permit while the former does not. To illustrate this point, the Second Circuit described the dam situation as analogous to lifting soup with a ladle from a pot and then returning the ladleful to the same pot, *Catskill Mountains*, 273 F.3d at 492. That is, the Second Circuit implicitly suggested that an inter-basin transfer would



Court to recognize the validity of the Sixth and District of Columbia Circuits' analyses of the Clean Water Act NPDES requirements and to reject the contrary conclusions of the Eleventh, First, and Second Circuits.

necessarily involve tainting a different pot. But while waters from different sources may have different constituents, or constituents in different concentrations, so may water above and below an impoundment. The natural constituents of untreated water do not trigger the permit provisions of the Clean Water Act. The fundamental purpose of the NPDES provisions is to ensure that new pollutants, such as those from wastewater treatment plants or industrial facilities, cannot be introduced to the nation's waters without a permit.

## CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court to reverse the decision of the Court of Appeals for the Eleventh Circuit to avoid serious negative consequences for the many public agencies and authorities nationwide involved in water management for water supply and flood control and related public purposes.

Respectfully submitted,

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In the

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

-v-

MICCOSUKEE TRIBE OF INDIANS, et al.,

*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

## BRIEF OF *AMICI CURIAE* TROUT UNLIMITED INC., CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether the transfer of water already containing pollutants resulting from human activities, from one water body to another water body not containing those pollutants, in violation of State-established water quality standards, constitutes an "addition" of pollutants requiring a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. §§ 1301, 1342?

## TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....v

INTERESTS OF AMICI CURIAE.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....5

I. TRANSFERS OF POLLUTED WATER THAT IS MOVED FROM ONE WATER BODY AND THEN DISCHARGED INTO A SEPARATE WATER BODY MEET THE CLEAN WATER ACT'S DEFINITION OF "DISCHARGE OF A POLLUTANT" FROM A "POINT SOURCE." .....5

A. The Transfer of Polluted Water From One Water Body and its Discharge into a Separate Water Body by Means of a Point Source Meets the Plain Meaning of the CWA § 301 Prohibition Against the Unpermitted "Addition" of a "Pollutant" from a "Point Source" to "Navigable Waters.".....5

B. The Statutory Purpose, Legislative History and Structure of the Clean Water Act Compel a Conclusion that the Transfer of Polluted Water From One Body of Water and its Addition Into a Separate Body of Water Is a Discharge of a Pollutant from a Point Source.....8

C. *National Wildlife Federation v. Gorsuch* and *National Wildlife Federation v. Consumer's Power* Dealt Solely with Movement within a Water Body Segment, and Gave Inappropriate Deference to an Informal EPA Interpretation.....11

II. A HOLDING THAT DISCHARGES OF POLLUTED WATER INTO SPECIFIC WATER BODIES DOES NOT REQUIRE A NPDES PERMIT IF THAT WATER IS TRANSPORTED FROM A SEPARATE WATER BODY WILL RESULT IN THE SEVERE IMPAIRMENT OF WATER BODIES RECEIVING SUCH DISCHARGES.....13

A. If Point Source Discharges of Polluted Water Transferred From Separate Water Bodies Are Exempted From the CWA's Permit Requirement, Achieving Water Quality Standards in Some Water Bodies Receiving Such Discharges Will Become Impossible.....13



B. The Catskill Mountains Case Exemplifies The Need to Require Permits for Point Source Discharges of Polluted Waters in Order to Achieve Water Quality Standards.....15

C. A Proposed Transfer of Colorado River Water Further Illustrates the Extent to Which Transfers of Polluted Water Damage Water Quality.....18

III. THE ELEVENTH CIRCUIT'S OPINION IN MICCOSUKEE WILL ALLOW APPROPRIATE WATER QUALITY REGULATION WITHOUT INFRINGING ON STATE'S POWERS TO ALLOCATE WATER.....21

A. Clean Water Act Section 101(g) Presumes Legitimate Regulation of Water Quality.....22

B. The Clean Water Act Requires State Water Allocation System to Accommodate Legitimate Water Quality Controls.....23

C. Congress Never Intended to Preclude Regulation of Water Rights for Water Quality Protection.....25

CONCLUSION.....28

## TABLE OF AUTHORITIES

**Cases** **Page**

*Alameda Water & Sanitation Dist. v. Reilly*, 930 F.Supp. 486 (D. Colo. 1996).....26

*Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 244 F.Supp.2d 41 (N.D.N.Y. 2003) .....16, 17

*Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001)..... *passim*

*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)..... 11

*Christensen v. Harris County*, 529 U.S. 576 (2000) ..... 13

*City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996)..... 23

*Connecticut Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515 (1945)..... 24

*Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996)..... 11

*EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976).....14

*Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d



1364 (11th Cir. 2002)..... ... 1, 10

*N. Plains Res. Council v. Fid. Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003)..... 7

*Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Circ. 1982)..... *passim*

*Nat'l Wildlife Fed'n v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988)..... 11

*PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994)..... *passim*

*Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (1985)..... 25, 25

*United States v. Akers*, 785 F.2d 814 (9th Cir. 1986).....24

*Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).....24

**Statutes and Regulations** **Page**

**Federal Statutes**

Rules of the Supreme Court of the United States, 28 U.S.C. Rule 37 (2003).....1

Clean Water Act, 33 U.S.C. § 1251(a)..... 4, 5, 8

Clean Water Act, 33 U.S.C. § 1251(a)(2)..... 14, 17

Clean Water Act, 33 U.S.C. § 1251(g)..... 4, 21, 22, 23

Clean Water Act, 33 U.S.C. § 1311..... 10

Clean Water Act, 33 U.S.C § 1311(a)..... 3, 5

Clean Water Act, 33 U.S.C. § 1312..... 10, 14

Clean Water Act, 33, U.S.C. § 1313..... 3, 10, 14

Clean Water Act, 33 U.S.C. § 1313(d)(4)..... 10

Clean Water Act, 33 U.S.C. § 1313(e)..... 14

Clean Water Act, 33 U.S.C. § 1315..... 14

Clean Water Act, 33 U.S.C. § 1315(b)..... .....18

Clean Water Act, 33 U.S.C. § 1329.....17

Clean Water Act, 33 U.S.C. § 1342..... 5

Clean Water Act, 33 U.S.C. § 1344(a)..... 9

Clean Water Act, 33 U.S.C. § 1344(f)(2)(F).....12

Clean Water Act, 33 U.S.C. § 1362(6)..... 5, 6, 9

Clean Water Act, 33 U.S.C. § 1362(7)..... 3, 5

Clean Water Act, 33 U.S.C. § 1362(12)..... 3, 5, 8

Clean Water Act, 33 U.S.C. § 1362(14)..... 5, 6, 7

Safe Drinking Water Act, 42 U.S.C. § 300(f)..... 17



**Federal Regulations**

40 C.F.R. § 131.20 (2003)..... 10

40 C.F.R. § 141.71(a)(2) (2003)..... 18

**State Regulations**

5 COLO. CODE REGS. § 1002-31.16, Table 1: Physical and Biological Parameters (2001)..... 19

5 COLO. CODE REGS. § 1002-39.2 (2001).....19

N.Y. COMP. CODES R. & REGS. TIT. 6, § 703.2 (1999).....17

**Other Authorities**

Brief Amici Curiae of the States of Colorado and New Mexico..... 21, 25, 27

Brief Amici Curiae of City of New York, et al..... 17

Brief Amici Curiae of the National Water Resources Association.....21, 26

Brief for the United States as Amicus Curiae Supporting Petitioner.....11, 20

Clean Water Act, 3 *Leg. Hist.* 532 (Senate Debate, Dec. 15,1977)..... 26

Colorado Water Conservation Board Power Point Presentation, Colorado River return Project Facilities, *available at:* http:/cwcb.state.co.us?SecB/Open%20House%20Exhibits%20show_files/frame.htm (slides 3,6,7)……..……20

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THE HISTORY OF ULSTER COUNTY 368-69 (Alphonso T. Clearwater ed., W.J. Van Deusen) (1907)……..…..15

*Nearby Spots Where Skilled Fishermen Find Trout*, N.Y. Times, Apr. 7, 1912……..……..16

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*Where To Go For Trout*, N.Y. Times, June 1, 1874……...16

123 Cong. Rec. 39, 212 (1977), *1977 Leg. Hist.* 532…. 26

## INTERESTS OF AMICI CURIAE

*Amici curiae* submit this brief in support of respondents Miccosukee Tribe of Indians, et al., and ask the Court to affirm *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1]

*Amici* include organizations of recreational anglers as well as local and national environmental protection groups, all of whom have a direct interest in safeguarding the quality of water in the United States. Among these *amici* are organizations whose members have had their ability to fish and otherwise enjoy specific natural rivers impaired by the transfer of polluted waters from one water body to another.

The transfers of waters containing pollutants from one water body to another threaten the quality of rivers and their fisheries throughout the United States. The Eleventh Circuit Court of Appeals decision should be affirmed because it is consistent with both the unambiguous language and the statutory purposes of the Clean Water Act ("CWA").

*Amicus* Trout Unlimited (TU) is a not-for-profit organization whose mission is to preserve, restore and protect North America's trout and salmon fisheries and their watersheds. TU has 135,000 members in the United States organized into more than 450 local chapters. TU members and chapters around the country work for improved fish habitat and water quality, including implementation of the

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[1] Pursuant to Rule 37.6 of this Court, amici represent that counsel for amici authored this brief in its entirety and that no person or entity other than amici and their representatives made any monetary contribution to the preparation or submission of this brief. The parties' counsel have consented to the filing of this brief, and letters reflecting that consent are submitted to the clerk's office with this brief.

Clean Water Act, in hundreds of watersheds across the country. One of TU's chapters is the Catskill Mountains Chapter ("CMCTU"), which is dedicated to conserving, protecting, and restoring the fisheries of the Catskills region, including the Esopus Creek, which was the subject the Second Circuit's decision in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001) (*Catskill Mountains*). In addition, Trout Unlimited operates the Western Water Project in five intermountain west states. Its mission is to work primarily in state level water allocation and water quality processes to ensure healthy flows for trout fisheries.

Theodore Gordon Flyfishers, Inc., (TGF), The Catskill-Delaware Natural Water Alliance (C-DNWA), and Federated Sportsmen's Clubs of Ulster County, Inc., (FSC) are each regional organizations dedicated at least in part to conserving, preserving, and protecting the fisheries of New York's Catskill Mountains region. Riverkeeper, Inc., is a not-for-profit organization dedicated to the protection of the ecological, economic, aesthetic and recreation qualities of the Hudson River, its tributaries and watersheds.

CMCTU, TGF, C-DNWA, FSC, and Riverkeeper are the plaintiffs in *Catskill Mountains*. In that case, the Second Circuit held that the discharge of mud and silt through a water supply tunnel constitutes the discharge of a pollutant from a point source and therefore requires a permit under section 402 of the Clean Water Act. *See Catskill Mountains v. City of New York*. The *Catskill Mountains* plaintiffs subsequently prevailed at trial and established that New York City had discharged pollutants without a permit, ruining the Esopus Creek as a recreational trout fishery.



## SUMMARY OF ARGUMENT

The plain language of the CWA supports the Eleventh Circuit's decision and compels affirming this case. The relevant language of the CWA prohibits the "addition" of a "pollutant" from a "point source" to "waters of the United States" without a permit. 33 U.S.C. §§ 1311(a), 1362(7), (12). Transporting a pollutant from one body of water and then discharging it through a point source into a separate body of water meets this definition squarely. The CWA does not qualify the permit requirement based on where the pollutant came from, nor does it create an exception to the permit requirement for transfers of polluted water from one water body to another. Indeed, the other two Circuit Courts of Appeals that have addressed this issue reached the same result as the Eleventh Circuit in this case.

Both the structure of the CWA and its declared national goal to restore and preserve the "integrity" of the nation's waters support affirming the Eleventh Circuit's holding that transferring and discharging polluted water falls within the National Pollutant Discharge Elimination System (NPDES) program. The paramount goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the primary means of achieving this goal is the implementation of water quality standards by each of the states under CWA section 303. 33 U.S.C. § 1313. Successful implementation, primarily by the states, of the NPDES permit program has been the primary successful method of moving towards achieving water quality standards. Reversing the Eleventh Circuit's decision in this case would allow water diversion facilities, including ski snowmaking systems, industrial cooling systems, and water supply systems, to discharge potentially highly polluted water into unpolluted waters, all without any effective

regulation under the CWA. This will result in the violation of water quality standards in numerous water bodies around the country, while at the same time eliminating the states' primary tool for correcting water quality standards violations. The destruction of the recreational trout fishery on Esopus Creek in New York's Catskill Mountains – in violation of the water quality standards for turbidity established by the State of New York -- illustrates the need to enforce water quality standards at these inter-basin point source discharges, as do other examples across the country.

Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), which preserves to the States the authority to allocate water quantity and water rights, does not preclude the regulation of water quality through the NPDES permit program. This Court has previously upheld the primacy of the CWA's water quality regulations over the reservation of water allocation authority in *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). CWA regulation of water quality is perfectly consistent with State authority to allocate water quantities.



## ARGUMENT

### I

### TRANSFERS OF POLLUTED WATER THAT IS MOVED FROM ONE WATER BODY AND THEN DISCHARGED INTO A SEPARATE WATER BODY MEET THE CLEAN WATER ACT'S DEFINITION OF "DISCHARGE OF A POLLUTANT" FROM A "POINT SOURCE."

#### A. The Transfer of Polluted Water From One Water Body and its Discharge into a Separate Water Body by Means of a Point Source Meets the Plain Meaning of the CWA § 301 Prohibition Against the Unpermitted "Addition" of a "Pollutant" from a "Point Source" to "Navigable Waters."

The bedrock objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see generally PUD No.1, supra*. The primary means Congress included in the CWA to achieve that goal is a requirement that discharges of pollutants from point sources have permits. *See* 33 U.S.C. §§ 1311(a), 1342.

The phrase "discharge of a pollutant" is defined in the Act as "any addition of any pollutant to navigable waters from any point source." *See* 33 U.S.C. § 1362(12). The Act further elaborates the definitions of "pollutant," "navigable waters," and "point source." *See* 33 U.S.C. §§ 1362(6), (7), (14). The definition of a "pollutant" specifically includes "dredged spoil," as well as "rock" and "sand." 33 U.S.C. § 1362(6). A "point source" subject to regulation "means any discernible, confined and discrete conveyance," and its definition specifically includes a "tunnel" as well as a "channel" or "conduit." 33 U.S.C. § 1362(14).

The language of these provisions covers the transfer of pollutants from one water body and their discharge into a separate water body through a pipe, channel, or tunnel. In the case before the Court, the S-9 pumping station causes an "addition" of phosphorous to water conservation area 3A by means of a "discernible, confined, and discrete conveyance," namely a pipe. In the *Catskill Mountains* case, a "discernible, confined, and discrete conveyance," namely the Shandaken Tunnel, caused an "addition" of sediments and turbidity to the clear waters of the Esopus Creek. *See* 273 F. 3d at 493-94. In both situations, the point source adds to a water body a pollutant that was not there before, and that would not be there but for the point source.

Nowhere does the Clean Water Act exempt from the NPDES permit requirement the transfer of polluted waters to a different water body segment. That they are in fact covered by the program is demonstrated by language in a number of provisions in the statute. For example, the definition of "point source" in section 502 of the CWA includes tunnels, channels, and conduits – all water transfer structures, 33 U.S.C. § 1362(14).

Further, the statute does exclude certain specific water transfers from the NPDES permit requirement, without providing a blanket exception for all water transfers. For example, section 502 of the Act explicitly excludes from the category "discharge of a pollutant" from a point source two types of water transfer. First, "[t]he term 'pollutant' … does not mean … (B) water … injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well … if [the] State determines that such injection or disposal will not result in the degradation of ground or surface water resources." 33 U.S.C. 1362(6). Second, "[t]he term 'point source' … does not include agricultural stormwater



discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). Both of these exempted activities involve transferring water in circumstances in which they are likely to contain pollutants, and then discharging the potentially polluted water somewhere other than where it was withdrawn.

Since Congress specifically excluded these water transfers from the definition of a "point source," other water transfers must be presumed to be "point sources." This would be consistent with the result reached recently by the Ninth Circuit, where that court required a permit for the discharge of polluted ground water through a point source to a surface stream. *N. Plains Res. Council v. Fid. Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003); *cert. den.* 72 U.S.L.W. 3280 (Oct. 20, 2003). A contrary interpretation in *Miccosukee* would render the exclusions of certain water transfers in section 502 superfluous.

**B. The Statutory Purpose, Legislative History and Structure of the Clean Water Act Compel a Conclusion that the Transfer of Polluted Water from One Body of Water and its Addition into a Separate Body of Water is a Discharge of a Pollutant from a Point Source.**

Petitioner argues that the addition of phosphorus into Water Conservation Area 3A does not constitute an "addition of any pollutant [in]to navigable waters"' 33 U.S.C. § 1362(12), because the phosphorus is already present in another navigable water, the C-11 basin. As explained above, this argument has no support in the plain language of the statute. It also is contrary to the purposes of the CWA, its legislative history, and its structure.

The core objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological *integrity* of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). The "integrity" language was critical to the Act's framers. As stated by the House Committee on Public Works in a report accompanying the House Bill on the Act:

> The word "integrity" as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained.... Although man is a "part of nature" and a product of evolution, "natural" is generally defined as that condition in existence before the activities of man invoked perturbations which prevented the system from returning to its original state of equilibrium.... Any change induced by man that overtaxes the ability of nature to restore conditions to "natural" or "original" is an unacceptable perturbation.



H. R. REP. NO. 92-911, at 76-77 (1972).

The transfer of water containing pollutants from one water body into another, unpolluted water body where that polluted water would never naturally flow destroys the "integrity" of the receiving water body. This is exactly the sort of "perturbation" of the natural order that the legislative history declared "unacceptable."

The wording of other relevant portions of the CWA shows Congress's intent to regulate the discharge of pollutants even though those pollutants may already be present in waters of the United States. Section 502 of the CWA includes "dredged spoil" in the definition of a "pollutant" subject to regulation, 33 U.S.C. § 1362(6), and section 404 of the CWA requires a permit for the deposit of "dredged . . . material" into navigable waters. 33 U.S.C. § 1344(a). Dredged spoil and dredged materials are materials typically removed from one body of water and deposited in another, or elsewhere in the same, body of water. Such pollutants are already present in navigable waters, yet their reintroduction is regulated by the CWA.

Finally, petitioner's argument that the addition of a pollutant to one body of water from another does not meet the definition of "discharge of a pollutant" is inconsistent with the provisions of the CWA related to water quality - based permitting and water quality standards. Those provisions likewise compel the conclusion that the CWA regulates the introduction of pollutants by point sources into individual water bodies.

The CWA provides for NPDES permit standards based both on what is technologically achievable for particular point sources (technology based permitting) and the permit limitations needed to achieve water quality standards. *See* 33 U.S.C. § 1311. The statute's mechanisms for implementing water quality based permitting take place on a water-body-by-water-body basis, in a fashion completely inconsistent with the petitioner's argument. Section 303 requires states to establish water quality standards for each water body in the state. 33 U.S.C. § 1313; *see also* 40 C.F.R. § 131.20 (2003). These water quality standards then form the basis for water quality - based permit limitations for point sources discharging into those individual bodies of water. *See* 33 U.S.C. § 1312, 40 C.F.R. § 131.20 (2003). Further, section 303(d) requires each state to identify each water body segment in the state that fails to meet water quality standards, and, among other things, to revise NPDES permits so that their effluent limitations are designed to achieve the water quality standards for those specific bodies of water. 33 U.S.C. § 1313(d)(4).

The water quality standards and standard-based permitting require evaluating individual bodies of water and setting permit limitations for discharges into individual bodies of water. This structure fully supports the Eleventh Circuit's conclusion that "addition" of a pollutant means addition from the outside world, where "outside world" includes "any place outside the *particular* water body to which pollutants are introduced." *See Miccosukee Tribe,* 280 F.3d at 1368 n.5 (quoting *Catskill Mountains*, 273 F.3d at 491) (emphasis added).

CWA section 303 not only requires the vast array of water quality standards that states have adopted for their thousands of water body segments, but its mandate requires this Court to reject the notion that "'the waters of the United



States' should be viewed as a whole for purposes of NPDES permitting requirements" proffered in the Solicitor's amicus brief in support of petitioner. *Brief for the United States as Amicus Curiae supporting Petitioner*, p. 19. To suggest that a polluted water body's water is not a pollutant when discharged into a pristine water body because they are part of "a whole" makes a mockery of the states' efforts to adopt different classifications and criteria on a segment-by-segment basis.

### C. *National Wildlife Federation v. Gorsuch* and *National Wildlife Federation v. Consumer's Power* Dealt Solely with Movement of Water Within a Water Body Segment, and Gave Inappropriate Deference to an Informal EPA Interpretation

Petitioner and its supporting *amici* argue that the decisions of the First, Second, and Eleventh Circuits in *Dubois v. United States Dep't of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997), *Catskill Mountains*, and *Miccosukee*, respectively depart from the "established" precedents of *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156 (D.C. Circ. 1982), and *Na'l Wildlife Fed'n v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988). This argument ignores the important factual distinction between *Gorsuch* and the water transfers involved in the more recent cases, as well as the fact that *Gorsuch* was decided based on *Chevron*-style deference to which EPA regulatory documents would not be entitled under current law. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

*Gorsuch* considered whether dams through which water passed from upstream to downstream constituted point

sources under the CWA.[2] *Consumers Power* addressed the same issue with respect to a pump storage station that pumped water uphill and then returned it to the same water body. The Second Circuit in *Catskill Mountains* held that these two cases did not apply to the transfer of polluted water from one water body into a completely different one. *Catskill Mountains,* 273 F. 3d at 491-93.

While acknowledging the *Gorsuch* gloss on the statutory term of "addition" to require an addition "from the outside world," the Second Circuit drew the inescapable conclusion that polluted water transferred miles under a mountain range is indeed an addition from the world outside the receiving waters:

> The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. Here, water is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the

[2] The D.C. Circuit held in *Gorsuch* that the discharge from the dam did not constitute an addition of a pollutant. *See Gorsuch*, 693 F.2d 156. As a result, dam discharges of the type reviewed in *Gorsuch* are today considered nonpoint sources of pollution. Petitioners argue that CWA § 304(f)(2)(F), 33 U.S.C. § 1344(f)(2)(F) should govern the transfer of pollutants through a point source to a different water body. (Petitioner's Brief [hereinafter "Pet'r Br."] at 29-30, 33, *South Florida Water Mgmt. Dist. V. Miccosukee Tribe of Indians*, 2003 WL 22137015 (2003 (No. 02-626) This Court should reject this interpretation as a gross expansion of the reach of CWA § 304 (f)(2)(F), 33 U.S.C. § 1344(f)(2)(F), which properly reaches those fact situations analogous to the ones at issue in *Gorsuch* or *Consumers Power*, but not situations involving the point-source discharge of pollutants from one water to another, such as presented in the instant case or *Catskill Mountains*.



> Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility.
>
> *Id.* at 492.

Moreover, the *Gorsuch* decision was based almost exclusively on deference to informal EPA interpretations of the term "addition." *See Gorsuch*, 693 F.2d at 167-74. Those types of informal agency interpretations are no longer entitled to *Chevron* deference under this Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000). *Gorsuch* and *Consumer's Power* not only presented critically different facts, they are also of questionable precedential value under current law.

## II

## A HOLDING THAT DISCHARGES OF POLLUTED WATER INTO SPECIFIC WATER BODIES DOES NOT REQUIRE AN NPDES PERMIT IF THAT WATER IS TRANSPORTED FROM A SEPARATE WATER BODY WILL RESULT IN THE SEVERE IMPAIRMENT OF WATER BODIES RECEIVING SUCH DISCHARGES.

### A. If Point Source Discharges of Polluted Water Transferred from Separate Water Bodies are Exempted from the CWA's Permit Requirement, Achieving Water Quality Standards in Some Water Bodies Receiving Such Discharges will Become Impossible.

As discussed above, in order to implement its statutory goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," 33 U.S.C. § 1251(a)(2), the CWA establishes a system of water quality-based point source permitting and directs states to establish water quality standards for all water bodies. *See* 33 U.S.C. § 1313; *see generally PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700, 704-705 (1994). Clean Water Act section 302 specifically provides for incorporation of more stringent water quality-based effluent limitations when uniform, technology based limitations are insufficient to achieve water quality standards. 33 U.S.C. § 1312.

As noted by this Court in *EPA v. California ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 205n.12 (1976), "numerous point sources, despite individual compliance with [technology based] effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." The CWA also sets up a number of planning measures and programs designed to allow each state to focus its efforts on water bodies that do not achieve water quality standards. *See, e.g.,* 33 U.S.C. § 1313(e) Continuing planning process [for achieving water quality]; 33 U.S.C. § 1315 (state reports on water quality).

The position argued by petitioners and their supporting *amici* in this case would, in effect, nullify these programs for waters receiving polluted water from separate water bodies. The total maximum daily load allocations set out in section 303(d) are specifically designed to operate through individual point source permits on individual water bodies. If transfers of polluted waters between distinct water bodies are immune from NPDES permitting, as proposed by the petitioners, then there will always be some portion of pollution in the receiving water body that cannot be



addressed through either point source or non-point source programs, since the water transfer is clearly a point source but would be exempt from regulation as such. Under the best of circumstances, the state and other polluters will have to incur considerable additional expense to further reduce other sources of the pollutant in the watershed. In many cases, this may require permitted point sources which have already invested in pollution controls to reconfigure or replace those controls to address new water quality conditions created by an inter-basin transfer of pollutants the state has neither planned for nor approved. In situations where the unpermitted point source discharge by itself causes a water quality standard violation (as in the *Catskill Mountains* case discussed below), then there will be no means of addressing the violation other than attempted voluntary measures, which have proven ineffective.

### B. The *Catskill Mountains* Case Exemplifies the Need to Require Permits for Point Source Discharges of Polluted Waters in Order to Achieve Water Quality Standards.

In *Catskill Mountains*, the Second Circuit applied the plain meaning of the CWA § 301 prohibition to require regulation of New York City's transfer of muddy, silt laden water into a pristine trout stream. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F. 3d 481 (2001). The factual circumstances of *Catskill Mountain*s illustrate the necessity of including these transfers in the CWA permitting scheme to achieve water quality standards.

The Esopus Creek is a world class trout stream that has attracted anglers to New York's Catskill Mountains since the nineteenth century. *See, e.g.,* THE HISTORY OF ULSTER COUNTY 368-69 (Alphonso T. Clearwater ed.,

W.J. Van Deusen) (1907); *Nearby Spots Where Skilled Fishermen Find Trout*, N.Y. Times, Apr. 7, 1912 at 11; *Where To Go For Trout*, N.Y. Times, June 1, 1874 at 8. Above the Shandaken Tunnel, the Esopus Creek is naturally clearer than the water reaching the creek through the Shandaken Tunnel. *See Catskill Mountains*, 273 F.3d at 485.

New York City operates the Shandaken Tunnel as part of its water supply system. The eighteen mile long tunnel traverses a mountain range and diverts water from the Schoharie Reservoir to the Esopus Creek. The Esopus Creek and the Schoharie Reservoir are two different and distinct water bodies located in two different and distinct watersheds. Water from the Schoharie Reservoir naturally flows north into the Mohawk River, whereas the Esopus Creek naturally flows southeast into the Ashqkan Reservoir and the Hudson River. *Id.*

The waters of the Schoharie Reservoir are polluted with fine red clay particles, which cause visible turbidity. This pollution is not purely "natural," but is caused in significant part by human activities in the Schoharie watershed. *See Catskill Mountains Chapter of Trout Unlimited v. City of New York,* 244 F.Supp.2d 41, 46-47 (N.D.N.Y. 2003).

The discharge of this muddy water transforms the Esopus Creek from a clear mountain trout stream to a muddy torrent. As established at the trial of the *Catskill Mountains* case, the turbid discharge to the Esopus Creek has made dry fly fishing difficult, because the trout cannot see cast flies, and dangerous, because the fishermen cannot see the bottom of the creek. *Id.* at 46. This turbid discharge violates New York's water quality standards, which preclude any turbidity "that will cause a substantial visible contrast to natural



conditions." N.Y. COMP. CODES R. & REGS. TIT. 6, § 703.2 (1999).

New York City's transfer of polluted water through the Shandaken Tunnel thus precludes the achievement of the water quality standards needed to protect the trout fishery and recreational uses of the Esopus Creek. The only hope of achieving this standard is for the New York State Department of Environmental Conservation to develop a permit with appropriate turbidity limits for the Shandaken Tunnel discharge – exactly the relief ordered by the District Court in the *Catskill Mountains* case. 244 F.Supp. 2d at 55-56.

New York City, in its *amicus* brief in support of petitioners, argues that the water quality violations caused by its inter-basin transfers should be addressed by controls on non-point sources, or under the Safe Drinking Water Act, 42 U.S.C. § 300(f), rather than permitting these transfers as point source discharges under CWA § 301. *Brief Amici Curiae of City of New York, et al.* at 15-21. New York City ignores the fact that neither the non-point source management programs contemplated by 33 U.S.C. § 1329, nor the Safe Drinking Water Act addresses the water quality standards violations caused by inter-basin transfers.

The non-point source controls invoked by New York City simply have not been effective to restore the nation's waters as sought by the Clean Water Act. The CWA declares the "interim" goal of assuring water quality sufficient to protect recreational uses (such as trout fishing on the Esopus Creek) no later than 1983. 33 U.S.C. § 1251(a)(2). Yet 20 years later, despite the non-point source control provisions of 33 U.S.C. § 1329, water quality violations persist on the Esopus Creek as well as in the Water Conservation Area 3A of the Everglades; in each case

due to discharges from clearly identifiable point sources. Indeed, EPA, in its latest report under CWA § 305(b), identifies siltation and nutrients (such as phosphorous) as the top causes of impairment of the nation's waters, and identifies uncontrolled nonpoint source pollution as the "leading source" of impairment of the nation's waters. *See* U.S. EPA, 2000 NATIONAL WATER QUALITY INVENTORY REPORT at ES-3 (2002) *available at* http://www.epa.gov/305b/2000report/execsum.pdf (last visited November 9, 2003); 33 U.S.C. § 1315(b). Clearly, non-point source management practices are no substitute for regulation of these transfers as point sources.

Similarly, the Safe Drinking Water Act provides no possible solution to these violations of water quality standards. The SDWA imposes water quality standards at the point of entry to a closed water supply distribution system – the first point of disinfection – and makes no effort to control the water quality upstream. 40 C.F.R. § 141.71(a)(2) (2003). Regulation of surface water quality for recreational use and fisheries protection is the ambit of the Clean Water Act, not the SDWA, and it is the Clean Water Act's regulation of point sources that applies to these cases by its terms and by its comprehensive scheme for achievement of water quality standards.

### C. A Proposed Transfer of Colorado River Water Further Illustrates the Extent to Which Transfers of Polluted Water Damage Water Quality.

Were this Court to reverse the 11th Circuit's holding in *Miccosukee*, states would lose the ability to protect some of their cleanest waters from potentially devastating discharges of polluted waters through diversion structures. For example, in 2003, the Colorado General Assembly appropriated $500,000 to the Colorado Water Conservation



Board (CWCB) to do a reconnaissance study for the Colorado River Return Project,[3] a 250,000 to 750,000 acre-foot water diversion from the 15-mile reach of the Colorado River between its confluence with the Gunnison River and the Utah border. The diverted water would be piped to the Continental Divide and then discharged, some back into the headwaters of the Colorado River, but most to the headwaters of the South Platte or Arkansas Rivers to run via gravity down to Colorado's population centers.[4]

The project would discharge levels of salinity and selenium too high, and water too warm for the receiving headwaters' cold water fisheries. The discharges would cause violations of the water quality standards for these headwaters streams, and would damage their ecological health. The project's source segment is warm water while the receiving headwaters are cold. Under Colorado water quality standards, cold water fisheries must maintain temperatures below 20°C, whereas warm water fisheries can sustain temperatures no higher than 30°C. 5 COLO. CODE REGS. § 1002-31.16, Table 1: Physical and Biological Parameters (2001). The State's Salinity Regulation explains, "Salinity … occurs at low concentrations in the headwaters … however, salinity concentrations increase downstream." 5 COLO. CODE REGS. § 1002-39.2 (2001). Measured levels of salinity in the source segment average 600-700 milligrams per liter.[5] The healthy cold water fisheries of Colorado's headwaters, where salinity levels

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[3] S.B. 03-110 § 15, 64th Colo. Gen. Assem. Reg. Sess., (Colo. 2003).

[4] Colorado Water Conservation Board (CWCB), Scope of Work for a Study of the Colorado River Return Project (CRRP) at 2. (*available at* http//www.cwcb.state.co.us/SecB/CRRS_Final_Scope.pdf) (last visited November 9, 2003).

[5] USGS National Water Quality Assessment Data Upper Colorado River Basin, Station # 09163500 Colorado River near the Colorado-Utah State line, *available at* http://waterdata.usgs.gov/co/nwis (last visited November 9, 2003)

average 50 mg/l, cannot survive at such levels.[6] Finally, data compiled by the U.S. Geological Survey in October 2002 revealed that concentrations of another pollutant, selenium, measure approximately 5.8 micrograms per liter, exceeding the source segment's water quality standard.[7] Concentrations between 4.6 and 5.0 micrograms per liter would be toxic to cold water fish.[8]

Because of the enormously detrimental implications of putting large quantities of saline, selenium-laced warm waters into healthy coldwater fisheries, the project currently proposes treatment to address the disparities in quality and temperature between the source and receiving waters.[9] However, if this Court were to hold that the discharge of polluted water diverted from one water segment to another does not require an NPDES permit, Colorado would no longer have to require a discharge permit for the Colorado River Return Project, resulting in devastation to whichever headwaters streams would be forced to receive the warm, polluted Colorado River water.

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[6] *See,* U.S.G.S. – N.A.W.Q.A. Water Quality in the Upper Colorado River Basin, Major Findings, *available at:* http://water.usgs.gov/pubs/circ/circ1214/major_findings2.htm (last visited November 4, 2003) (USGS Upper Colorado River Basin Findings).

[7] R.M. Crowfoot et. al., USGS, National Water Quality Assessment Program, Water Resources Data, Colorado, Water Year 2002 Vol. 2 Colorado River Basin.

[8] USGS Upper Colorado River Basin Findings, *supra*.

[9] Colorado Water Conservation Board Power Point Presentation, Colorado River return Project Facilities, *available at:* http:/cwcb.state.co.us?SecB/Open%20House%20Exhibits%20show_files/frame.htm (slides 3,6,7).



## III

### THE ELEVENTH CIRCUIT'S OPINION IN *MICCOSUKEE* WILL ALLOW APPROPRIATE WATER QUALITY REGULATION WITHOUT INFRINGING ON STATES' POWERS TO ALLOCATE WATER.

In the proceedings below, no party argued the primacy of state water allocation systems before the 11th Circuit, and that court's opinion is silent on the issue. However, before this Court, petitioner argues under section 101(g) of the CWA that the 11th Circuit's decision impinges upon water allocation issues reserved solely to the states. *Pet'r Br.* at 34-35; 33 U.S.C. § 1251(g). Several of the *amici* who filed in support of petitioner have gone further, suggesting that a ruling to uphold *Miccosukee* would weaken the Clean Water Act's reservation of state power over water allocation and wreak havoc on the exercise of water rights. *Brief Amici Curiae of the States of Colorado and New Mexico* (CO-NM Brief) at 20, *Brief Amici Curiae of the National Water Resources Association, et al.* (NWRA Brief) at 17.

This Court must reject petitioner's and its *amicis'* water rights arguments as contrary both to the Clean Water Act and the reality of current state implementation. First, the Clean Water Act does not exempt the exercise of water rights from permitting for water pollution control objectives; in fact, this Court has expressly affirmed a state's ability to condition the exercise of water rights for water pollution control purposes. *PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700, 701-702 (1994). Second, water rights transfers are in fact already widely subject to CWA permitting without significant adverse effect, albeit pursuant to CWA §404, governing discharges of dredged and fill material.

### A. Clean Water Act Section 101(g) Presumes Legitimate Regulation of Water Quality.

As noted, the CWA seeks its ultimate goals of achieving acceptable water quality throughout the nation through a mix of related programs, including the requirements: (1) to adopt water quality standards protective of all waters of the United States, (2) to implement mandatory permits for discharges of pollutants from point sources, and (3) to address diffuse sources of pollution through non-point programs, which may be voluntary. The Act assigns primary responsibility for implementation of this program to the states, with periodic oversight from EPA.

Notwithstanding the breadth of the Act, in 1977 amendments to the CWA, Congress declared its policy that neither state authority "to allocate quantities of water" nor state-established "rights to quantities of water" would be "superceded, abrogated or impaired" by virtue of the CWA. 33 U.S.C. § 1251(g). Even here, however, Congress recognized the connection between water quality and water quantity, adding into this declaration that: "Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution *in concert with* programs for managing water resources." *Id.* (emphasis added). Thus, Congress coupled its admonition against interference with state authority over water rights with a directive to develop solutions that respect existing water allocation systems while simultaneously preventing and reducing pollution of the nation's waters.

Requiring permits for transferring polluted water in no way impairs state authority to allocate water or infringes on water rights themselves. A party holding a right in water that happens to be polluted still holds that right; the permit requirement simply means that if the party wishes to exercise



that right in a specific way – by moving the water to another water body and discharging it through a point source – the party will have to obtain a permit relating to the quality (but not the quantity) of the water being moved.

Nor does state water allocation law provide an adequate substitute to ensure protection of water quality standards. For example, in Colorado, other water rights holders may be protected from the discharge of water so polluted as to make it impossible for these water rights holders to apply the water to their beneficial uses. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 91 (Colo. 1996). However, this principle will not protect instream recreation and fisheries uses because, with very limited exceptions, Colorado does not allow instream recreation or fishery water rights. *Id.* at 93-94. Moreover, state water quality law is subordinate to state water law. *Id.* at 90.

### B. The Clean Water Act Requires State Water Allocation Systems to Accommodate Legitimate Water Quality Controls.

In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700, this Court rejected the assertion that water quality control pursuant to the Clean Water Act cannot affect some aspects of the manner in which a water right is exercised. The Court found the distinction between water quality and water quantity control to be "artificial ... since a sufficient lowering of quantity could destroy all of a river's designated uses, and since the Act recognizes that reduced stream flow can constitute water pollution." *PUD No. 1* at 701. Further, this Court stated that § 101(g) of the Act "preserve[s] the authority of each State to allocate water quantity as between users, [but does] not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water

allocation." *Id.* at 720. Rather, this Court noted that permit or license conditions imposed through Clean Water Act authorities "merely determine[] the nature of the use to which that proprietary right may be put under the Clean Water Act." *PUD No. 1,* at 721.

Lower courts have uniformly come to the same conclusion – that §101(g) does not limit water restrictions on the exercise of water rights, provided that the restriction serves a legitimate purpose under the Clean Water Act and does not abrogate the underlying water right or water allocation system. For example, in *United States v. Akers,* 785 F.2d 814 (9th Cir. 1986), the 9th Circuit held that any incidental effect of a Clean Water Act permit requirement on a farmer's rights to state-allocated water was justified because protection of wetlands providing seasonal refuge for numerous species, including endangered species, was the type of "legitimate purpose" for which the Clean Water Act was intended. *Akers* at 818 (quoting *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 315 (1982)).

The court further determined that the statute as a whole makes clear that, "where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permitting process." *Akers,* 785 F.2d at 821.

Similarly, in *Riverside Irrigation Dist. v. Andrews,* the 10th Circuit defined § 101(g) merely as a "general policy statement" which could not nullify an express permitting provision even if the provision seemed inconsistent with the broadly stated purpose of the policy statement articulated in 101(g). *Riverside*, 758 F.2d 508, 513 (1985) (quoting *Connecticut Light & Power Co. v. Fed. Power Comm'n,* 324



U.S. 515, 527 (1945)). While in *Riverside*, the permit at issue was pursuant to CWA § 404, the logic applies equally to the section 402 permitting at issue in this case.[10]

Even in *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F. 2d 156 (1982), a case petitioners cite to support their arguments, the D.C. Circuit interpreted section 101 (g) not to foreclose regulators from imposing pollution control requirements on the exercise of water rights. The court stated that section 101(g) indicated that Congress did not want to interfere "any more than necessary" with state water management. *Gorsuch* 693 F.2d at 178. Thus, to the extent that the D.C. Circuit determined that the Clean Water Act required no NPDES permit for a dam that blocks water in a river channel, stores it and then releases it back downstream, the Court did not find that Clean Water Act regulation could not reach the exercise of a water right, but rather that there was no addition of a pollutant in that factual situation. *Id.* at 179, 183.

### C. Congress Never Intended To Preclude Regulation of Water Rights For Water Quality Protection.

The legislative history of section 101(g) provides further support for Congress' intent not to preclude regulation of transfers of polluted water to achieve water pollution control objectives. Senator Wallop, who sponsored

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[10] The States of Colorado and New Mexico argue in their amicus brief in support of petitioners that upholding the 11th Circuit's opinion in *Miccosukee* would lead to violations of inter-state water compacts. *Brief of Colorado & New Mexico*, pp. 20-22. The court in *Riverside* disagreed with a similar argument made there, noting that the requirement for a permit "has not denied Colorado its right to water use under the South Platte River Compact." 758 F.2d at 513-14.

the amendment adding section 101(g), stated that it was not intended to "take precedence over legitimate and necessary water quality considerations." 123 Cong. Rec. 39, 212 (1977), *1977 Leg. Hist.* 532. Senator Wallop explained that the requirements of section 402 and 404 permits; for instance, may incidentally affect individual water rights; that it was not the purpose of the amendment to prohibit those incidental effects so long as those effects were prompted by legitimate and necessary water quality considerations; and that he did not intend section 101(g) to interfere with the legitimate water pollution control purposes of the Clean Water Act. 3 *Leg. Hist.* 532 (Senate Debate, Dec. 15, 1977).

In addition, to the extent that petitioner and some of its amici suggest that Congress intended for the Clean Water Act never to affect the exercise of a water right, they simply overstate their case. *See, e.g.,* NWRA Brief at 14. This is so because diversion and transfer facilities constructed to allow entities to exercise their water rights are in fact widely regulated pursuant to CWA § 404, which requires entities discharging dredged or fill material into the nation's waters to obtain a permit. 33 U.S.C. § 1344. As was the case in *Riverside, supra,* most such activities operate pursuant to general permits which require no more than notification. However, most larger diversion and transfer facilities do require individual permits. Yet, it is rare indeed that this permit program interferes with the exercise of the water right. *See, Alameda Water & Sanitation Dist. v. Reilly*, 930 F.Supp. 486, 493 (D. Colo. 1996).

Just as the 404 permit program has not stopped water diversions and transfers, nor will broader application of the NPDES program. Notwithstanding *amici*'s claims that water projects across the West will be shut down, *see, e.g., CO-NM Brief at 3-4,* the requirements of the CWA are unlikely to produce such dire results. This is so not only because most



produce such dire results. This is so not only because most water transfers that would require permits would operate pursuant to general NPDES permits, just as do hundreds of thousands of stormwater discharges operating under NPDES permits, but also because, as *amici* note, most water transfers do not result in violations of water quality standards. Therefore, even where an activity might need an individual NPDES permit, most such activities' permit conditions will not require treatment to meet water quality standards. Only where the discharge of pollutants causes violations of a receiving stream's water quality standards will there be any treatment required. And, in those relatively limited, but important situations, the CWA will require treatment to protect the integrity of the nation's waters.

## CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the decision of the Eleventh Circuit Court of Appeals applying the Clean Water Act's point source permitting requirements to the transfer of polluted water between distinct water bodies.

Dated: November 12, 2003

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# In The Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## AMICUS BRIEF OF THE ASSOCIATION OF STATE WETLAND MANAGERS AND THE TROPICAL AUDUBON SOCIETY IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF INTEREST | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 3 |
| I. REDUCTION OF PHOSPHORUS IN THE EVERGLADES IS CRITICAL TO RESTORING THE ECOSYSTEM | 3 |
| A. The Everglades Is a Unique, Internationally Important Ecosystem | 4 |
| 1. The Everglades Is an Extremely Sensitive Oligotrophic System | 7 |
| a. Sawgrass | 8 |
| b. Periphyton | 9 |
| 2. Development Has Destroyed Half of the Everglades and Now Threatens the Rest | 10 |
| B. Phosphorus Is Killing the Everglades and Endangering Water Supplies | 11 |
| C. Petitioner's Stormwater Collection System Is a Significant Source of Phosphorous | 14 |
| II. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT S-9 REQUIRES A NPDES PERMIT UNDER § 301(a) OF THE CWA | 17 |
| A. S-9 Is a Point Source | 17 |
| B. C-11 and WCA-3 Are Physically Separate Waterbodies | 18 |

TABLE OF CONTENTS – Continued


Page

1. Petitioner's Unitary Waters Theory Does Not Hold Water ..... 18
2. Florida Manages C-11 and WCA-3A as Separate and Distinct Waterbodies ..... 19
3. S-9 Pumps Stormwater Uphill from C-11 into WCA-3A ..... 20

C. S-9 Adds Pollutants to Waters of the United States ..... 20
1. Plain Meaning of Addition ..... 21
2. Petitioner's Argument Distorts the Plain Meaning of Addition ..... 21
3. The Solicitor General Has Taken Inconsistent Positions on the "Addition" Issue ..... 22

III. ALTERNATIVELY, S-9 SHOULD BE REGULATED AS A STORMWATER DISCHARGE UNDER 402(p)(2)(E) ..... 24

IV. REGULATION OF S-9 IS COMPATIBLE WITH THE TMDL PROGRAM ..... 26

CONCLUSION ..... 29

APPENDIX ..... App. 1




TABLE OF AUTHORITIES


Page

CASES

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) ..... 23

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Page

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33 U.S.C. § 1342(p)(2)(A)-(D).....25

33 U.S.C. § 1342(p)(2)(E).....25

33 U.S.C. § 1362(12).....17

33 U.S.C. § 1362(14).....17, 21

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Page

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## STATEMENT OF INTEREST

The Association of State Wetland Managers ("ASWM") and the Tropical Audubon Society submit this brief *amicus curiae* in support of Respondents Miccosukee Tribe of Indians and Friends of the Everglades, Inc.[1]

ASWM is a nonprofit federal 501(c)(3) membership organization dedicated to the protection and management of the Nation's wetland resources. The goals of the Association include the following: translate wetland science into fair and reasonable government policies; help states develop and implement wetland regulatory and management programs; improve the coordination of wetland programs and policies at all levels of government; facilitate the integration of wetlands into water resources and watershed management; and build conservation and restoration partnerships among states, tribes, local governments, not-for-profits, and other interested parties.

The Tropical Audubon Society is a nonprofit conservation and education organization established in 1947 to protect the natural world, promote wise stewardship of natural resources and foster – among members and the public in general – an understanding and appreciation of nature and ecological relationships. Many of its members use and enjoy the Everglades for bird watching and other nature study oriented recreation.

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[1] Counsel for the parties consented to the filing of this brief and letters reflecting that consent are filed in the clerk's office. No counsel for a party in this case authored any part of this brief, and no person other than *amici* or their representatives made any monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.

## SUMMARY OF ARGUMENT

This case has important implications for the restoration of the Everglades, one of the most unique wetland resources in the world. Half of the Everglades has already been destroyed by agricultural and urban development. The remainder is under assault from a variety of causes, but phosphorous is the major problem. Phosphorus is turning the fabled "River of Grass" into a dead zone where cattails are the "markers on the grave." Petitioner's stormwater management system, including the S-9 Pump Station ("S-9") at the center of this dispute, is feeding more and more phosphorous to an already overstressed ecosystem.

The question presented is whether the Clean Water Act ("CWA" or the "Act") requires Petitioner to obtain a National Pollutant Discharge Elimination System ("NPDES") permit to operate S-9. The answer to that turns on a very narrow question of whether the phosphorous that is undeniably being discharged from S-9 meets the technical definition of an "addition" under the Act. Plainly, it does.

Contrary to Petitioner's assertion that phosphorous simply "passes through" S-9 on its way to the Everglades, the purpose of S-9 is to force the polluted water to go where it would not otherwise go. S-9 is part of an elaborate stormwater and flood control system for Broward County. S-9 takes massive quantities of stormwater out of the C-11 canal ("C-11") and pumps it uphill, five to six feet, and into Water Conservation Area ("WCA")-3A, a section of the Everglades. The C-11 Basin and WCA-3A are physically separate water bodies, that are managed separately by the State of Florida under its water quality programs. Thus,



there is no merit to the "unitary waters" theory advanced by Petitioner, and unfortunately endorsed by the Solicitor General. The normal weight that ought to be accorded the Solicitor's view is inappropriate here because of the conflicting positions the United States has taken before this Court in other cases involving the same question.

Alternatively, S-9 should be regulated as a stormwater discharge under Section 402(p)(2)(E) of the CWA. That provision requires a NPDES permit for any stormwater discharge that is a "significant contributor of pollutants to the nation's waters." The record indisputably establishes that S-9 does exactly that. This constitutes an alternative ground for upholding the Eleventh Circuit's decision in *Miccosukee Tribe of Indians v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), or for remanding the case in the event the Court reverses on the primary ground.

Finally, and contrary to Petitioner's "sky is falling" assertions, regulation of S-9 under the NPDES program will strengthen, not weaken, the overall restoration effort for the Everglades. Indeed, requiring all point sources to reduce phosphorous discharges is exactly the medicine the Everglades needs to recover.

## ARGUMENT

### I. REDUCTION OF PHOSPHORUS IN THE EVERGLADES IS CRITICAL TO RESTORING THE ECOSYSTEM.

The greater Everglades ecosystem (the "Everglades") is an international treasure. However, anthropogenic loading of phosphorus is destroying the Everglades. J.A 165-68. Reducing the amount of phosphorus entering the

Everglades is crucial to the success of Everglades restoration programs. *See* J.A. 165-68. The NPDES program provides the necessary mechanism to reduce phosphorus loading in the Everglades.

### A. The Everglades Is a Unique, Internationally Important Ecosystem.

Before humans interfered, water in the Everglades flowed independently of channels, rivers and other conveyances. The integrity of the Everglades depends on "sheet flow" – a wide, shallow flow of water that once originated near Orlando but now begins south of Lake Okeechobee. J.A. 178, 190-97. As the sheet flow moves south toward Florida Bay it creates a vast sawgrass wetland – the "River of Grass" immortalized by Marjory Stoneman Douglas – that is home to an overwhelming variety of habitats, flora and fauna. Marjory Stoneman Douglas, *The Everglades: River of Grass* 10 (1947). This is the only example of a sheet flow ecosystem in the world. Thomas E. Lodge, *The Everglades Handbook: Understanding the Ecosystem* 10 (1994).

In 1947, President Harry S. Truman captured the significance of the Everglades during his dedication of Everglades National Park ("ENP"):

> Here are no lofty peaks seeking the sky, no mighty glaciers or rushing streams wearing away any uplifted land. Here is land, tranquil in its quiet beauty, serving not as a source of water, but as the last receiver of it. To its natural abundance we owe the spectacular plant and animal life that distinguishes this place from all others in our country.[2]



ENP is the only national park in the Western hemisphere designated as an International Biosphere Reserve, a World Heritage Site, and a Ramsar Wetland of International Importance. J.A. 147 ¶ 14; National Park Service, *Everglades National Park: A Park In Danger*, *at* http://www.nps.gov/ever/eco/threats2.htm (last visited Nov. 4, 2003). However, the Everglades transcends the boundaries of ENP and contains ecologically important areas including Big Cypress National Preserve, Biscayne Bay National Park, Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Water Conservation Areas. *See* J.A. 30, 36; Peter Alden et al., *National Audubon Society: Field Guide to Florida* 417-31 (1998).

The Everglades, like other wetlands, performs many beneficial functions. As this Court has recognized, wetlands "filter and purify water draining into adjacent bodies of water [citation omitted] . . . slow the flow of surface runoff into lakes, rivers and streams and thus prevent flooding and erosion." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985). Water pumped into WCA-3A mixes with water in the Everglades. This water recharges the Biscayne Aquifer and municipal wells that serve South Florida's burgeoning population. J.A. 59, 109, 111, 117.

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[2] National Park Service, *Everglades National Park: Park Establishment*, *at* http://www.nps.gov/ever/eco/nordeen.htm (last visited Nov. 4, 2003).

Wetlands also "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing, and resting sites for aquatic . . . species [citation omitted]." *Riverside Bayview*, 474 U.S. at 135. ENP alone supports more than 1000 species of seed-bearing plants and 120 tree species. NPS, *Everglades National Park: A Park for the World, at* http://www.nps.gov/ever/presskit/heritage.htm. Over 60 of these species are endemic. Ramsar Convention on Wetlands, *The Annotated Ramsar List: United States of America, at* http://www.ramsar.org/profiles_usa.htm (last visited Nov. 4, 2003). The ENP is also home to 25 orchid species as well as a rich variety of amphibians and reptiles. Wetlands International, *A Directory of Wetlands of International Importance: Everglades National Park, at* http://www.wetlands.org/RDB/Ramsar_Dir/USA/US005D02.htm (last visited Nov. 4, 2003). Finally, the Everglades harbors at least 36 endangered or threatened species. *See* NPS, *Park for the World, supra*.

The Everglades is perhaps best known for its diverse bird population. Scientists have documented 400 naturally occurring species of birds within the Everglades. Lodge, *supra*, at 145. About 60 percent of these birds are migratory. *Id.* Life in the Everglades is dependent on pristine water quality. J.A. 165-68. Unfortunately, beginning in the late 19th century, the demands of southern Florida's growing human population compromised much of this critical habitat. In the past few decades, the numbers of wading birds nesting in rookeries has declined by 90 percent in the southern Everglades alone. *See* Donald L. DeAngelis et al., *Modeling Ecosystem and Population Dynamics on the South Florida Hydroscape* 246, *in The Everglades, Florida Bay and Coral Reefs of the Florida*



*Keys: An Ecosystem Sourcebook* (James W. Porter & Karen G. Porter eds., 2002) [hereinafter *Everglades Sourcebook*].

### 1. The Everglades Is an Extremely Sensitive Oligotrophic System.

Oligotrophic wetlands are characterized by hydric soils and water that are nutrient poor and rich in oxygen. J.A. 165-68. Historically, only a small amount of nutrients entered the ecosystem through rainfall. Lodge, *supra*, at 10. The biodiversity of the Everglades depends upon these nutrient poor conditions. J.A. 165-68. Phosphorus is the limiting factor on primary productivity (*e.g.* algal growth). J.A. 126, 165-68. Background levels of phosphorus in the pristine Everglades[3] are only five or six parts per billion (ppb).[4] J.A. 30. As a result, the flora of the Everglades is

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[3] Data taken from over 400 reports determined that a phosphorus standard of 10 parts per billion (ppb) would not be overly protective or below the natural background levels of the Everglades. Memorandum from Dan Scheidt, Senior Scientist, South Florida Initiative, to John H. Hankinson, Jr., Environmental Protection Agency Regional Administrator 9 (Jan. 19, 2001), *available at* http://www.epa.gov/region04/southflorida/miccosukee/newmemo.pdf (last visited Nov. 4, 2003). EPA approved the Miccosukee Tribe's request for 10 ppb as a specific protective standard for phosphorus in tribal portions of the Everglades. *See* Press Release, Environmental Protection Agency, EPA Approves Tough Phosphorous Limit for Tribal Waters in Everglades, *available at* http:www.epa.gov/Region4/oeapages/99press/052699.htm (last visited Nov. 4, 2003). However, phosphorus concentrations at the S-9 Pump Station are as high as 20-100 ppb. J.A 45.

[4] One drop of ink in an Olympic-sized swimming pool is the equivalent of one part of phosphorus per billion parts of water. Texas Natural Resource Conservation Commission, *What Is A Part Per Billion? at* http://www.tnrcc.state.tx.us/permitting/remed/site/ssdap/jonesroad/ppb_chart.pdf (last visited Nov. 4, 2003).

highly susceptible to the addition of phosphorus, which changes aquatic productivity. J.A. 165-68. These oligotrophic conditions, coupled with the interplay between topography and hydrology, are crucial to the structure, function and composition of the Everglades.[5] *See* Lodge, *supra*, at 10-16. Everglades habitats, and the biota which have evolved to fill these respective niches, are unique and each play an important role within the ecosystem. In particular, the sawgrass and periphyton communities are crucial to the ecological integrity of the Everglades.

**a. Sawgrass.**

Sawgrass comprises "65 to 70% of the total vegetation cover of the Everglades." Paul V. McCormick et al., *Effects of Anthropogenic Phosphorus Inputs on the Everglades* 91, *in Everglades Sourcebook, supra*. It is arguably the most characteristic flora in the Everglades. Lodge, *supra*, at 19. Sawgrass wetlands are sparsely vegetated and open, attracting a variety of wildlife ranging from invertebrates to wading birds. *See* Environmental Protection Agency, *South Florida Ecosystem Assessment Vol. 1 Final Technical Report Phase I, Monitoring for Adaptive Management: Implications for Ecosystem Restoration* 7-1, *available at* http://www.epa.gov/region4/sesd/reports/epa904r98002.html (last visited Nov. 4, 2003) [hereinafter *Ecosystem Assessment*]; Lodge, *supra*, at 35. The openness of sawgrass wetlands allows for gas exchange with the atmosphere,

[5] The topography of the Everglades decreases in elevation from 18 feet above sea level at Lake Okeechobee to sea level at the southern terminus of the Everglades. *See* Peter Alden et al., *National Audubon Society: Field Guide to Florida* 13 (1998).



promoting well oxygenated waters. *Id.* Sawgrass helps maintain water quality by filtering, diluting and removing excess nutrients. *See* William A. Niering, *National Audubon Society Nature Guides: Wetlands* 32-34 (1998). Sawgrass also helps purify the water by allowing for sheet flow movement. These wetland functions are essential for cleansing and replenishing the Biscayne Aquifer, which supplies most of the drinking water for southern Florida. *See Report to the Working Group of the South Florida Ecosystem Restoration Task Force, South Florida Ecosystem Restoration: Scientific Information Needs* 369 (1996), *available at* http://everglades.fiu.edu/taskforce/scineeds/sub9.pdf (last visited Nov. 7, 2003) [hereinafter *Task Force*]. When phosphorus is added to the Everglades, cattail stands, which thrive in nutrient rich conditions, multiply quickly and crowd out sawgrass. *See* J.A. 38-39, 165-68.

**b. Periphyton.**

Periphyton is an integrated community of benthic algae that cover plant stems and the soil surface of the Everglades. McCormick et al., *supra*, at 139; Lodge, *supra*, at 30-33. Periphyton is adapted to oligotrophic conditions and is used as a biological indicator species due to its sensitivity to changes in nutrient levels. *See* Lodge, *supra*, at 32-33; McCormick, *supra*, at 103. "Periphyton productivity oxygenates the water column" and influences nutrient cycling. *Ecosystem Assessment*, *supra*, at 5-2. Periphyton is also an important link in the complex Everglades food web. *See* Lodge, *supra*, at 31-32.

### 2. Development Has Destroyed Half of the Everglades and Now Threatens the Rest.

Since the 1880s, humans have destroyed 50 percent of the habitats that comprised the historic Everglades. *See Ecosystem Assessment, supra*, at 1-1. Prior to human alteration, virtually all of Florida to the south and southeast of Orlando was part of the greater Everglades ecosystem. J.A. 178, 190, 197. The historic Everglades extended over 99 miles in length and incorporated about 4000 square miles. Lodge, *supra*, at 10.

The integrity of the Everglades was further undermined by extensive modifications made under the Central and South Florida Project ("CSFP"). The CSFP changed the natural hydropattern – the "depth, timing, duration and distribution of surface water" in the Everglades. *Ecosystem Assessment, supra*, at 1-5. Because of changes to the hydropattern, the Everglades no longer resembles the Everglades that existed prior to the years of human modification. *Id.*

Today, the Everglades stretches from Lake Okeechobee, south to Florida Bay, west to Big Cypress National Preserve and east to the Atlantic Ocean. J.A. 170, 178, 197. Most of these surviving remnants of the Everglades are contained within the boundaries of ENP, Loxahatchee National Wildlife Refuge and the WCA-2 and WCA-3. Petitioner manages both WCA-2 and WCA-3. Even at its reduced size, the Everglades remains one the most extensive freshwater wetland systems in the United States. *Ecosystem Assessment, supra*, at 5-1.



### B. Phosphorus Is Killing the Everglades and Endangering Water Supplies.

Adding phosphorus to the Everglades disrupts the entire structure and function of the Everglades, including the system's ability to purify water and recharge groundwater. J.A. 59, 165-68. The Biscayne Aquifer, which is "one of the most permeable aquifers ever investigated and probably the most permeable water-table aquifer in the world," is particularly affected. *Task Force, supra,* at 369. "Because of the Biscayne Aquifer's shallow depth and permeability, groundwater contamination is a constant threat. . . ." *See Id.* at 382.

The drainage projects also reduce freshwater saturation and allow saltwater to encroach and contaminate the aquifer. J.A. 59, 109, 111; *see* United States Geologic Survey, *An Overview of the Southern Inland and Coastal System Project of the U. S. Geological Survey South Florida Ecosystem Program* 1, 2 (2000), *available at* http://time.er.usgs.gov/whnew/v2n1/overview/overview.pdf (last visited Nov. 3, 2003). Therefore, not only has the Everglades purifying capacity been diminished, but the groundwater is at risk of contamination from saltwater intrusion. This is only one of many examples of the cascading effects of phosphorus introduced by point sources such as S-9.

When phosphorus is added to the system, nutrient cycling is disrupted because periphyton productivity and microbial respiration are destabilized. J.A. 14, 126-27; McCormick et al., *supra*, at 101-103. This imbalance creates a deficit of dissolved oxygen in the water when eutrophic cyanobacteria, green algae and diatoms replace oligotrophic cyanobacteria, blue-green algae and diatoms.

J.A. 127; McCormick et al., *supra*, at 103. This imperceptible change in nutrient cycling rates is the beginning of a tremendous cascading effect throughout this oligotrophic ecosystem. It only takes between 10 and 20 ppb of phosphorus before periphyton function is disrupted. J.A. 31. As eutrophic cyanobacteria proliferates, the composition of the water body becomes dominated by species tolerant of low dissolved oxygen. Cattails – which thrive in nutrient enriched, poorly oxygenated waters – replace sawgrass, which further disrupts nutrient cycling. J.A. 38-39.

> Once the cattail stand dominates the area, it doesn't add oxygen to the water the way the rooted aquatic plants and the periphyton and the sawgrass do. The majority of the cattail discharges oxygen to the atmosphere because the majority of the plant is above the water. The stems of those cattail plants are very dense, . . . and they have a tremendous shading effect on the sunlight that gets down to the water surface within the stand so that the amount of light that's necessary for photosynthesis, if there were plants and periphyton there to observe that light to produce oxygen during the photosynthetic cycle, that light's been reduced significantly. The cattails also grow very fast, and as they grow, they shed some of their leaves. That forms a dense mat of material in the water column, and that's being partially decomposed by bacteria. The bacteria use up what remaining oxygen is in the water so that most of the time there's zero for 15, 18, 20 hours a day . . . inside the cattail stand it's anaerobic. You won't find any fish there, you won't find any aquatic bugs that fish feed on, and it's a pretty nasty place.



*Id.* (statement of Dr. Timothy Bechtel, Sr. Supervisory Environmental Scientist, Department of Water Resources Evaluation, SFWMD). As a result, cattails are referred to as "markers on the grave of the Everglades." Neil Santaniello, *'Glades Element at Center of Dispute: Life-Giving Phosphorus Carries Dangers*, Sun-Sentinel, May 25, 2003, at A1 (quoting Dr. Ronald Jones)[6], *available at* LEXIS, US Newspapers.

Cattails are spreading throughout the Everglades. Large areas of northeastern WCA-3A and areas north of S-9 are being invaded by cattails. South Florida Water Managment District, *Central Everglades, at* http://www.sfwmd.gov/org/wrp/wrp_evg/2_wrp_evg_glades/central.html (last visited Oct. 16, 2003). WCAs show invasion of cattail stands in areas that used to be strictly sawgrass. J.A. 165-68. However, there is a delay between the time phosphorus enters the system and the appearance of cattails.

The lag time between the onset of phosphorus enrichment and cattail response can be as long as several decades. McCormick et al., *supra*, at 109. By the time the effects are visible, the damage is done. We are only beginning to see the destruction that will occur due to excessive amounts of phosphorus in the Everglades. This destruction is irreversible. J.A. 168.

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[6] Dr. Ronald Jones, of Florida International University, is "a water quality expert, including water quality in wetland systems (especially oligotrophic systems, such as the Florida Everglades)." J.A. 164.

### C. Petitioner's Stormwater Collection System Is a Significant Source of Phosphorous.

Petitioner operates an extensive system of canals and levees that collects runoff from the C-11 Basin in Broward County. *Id.* at 7-11. For a map of the C-11 Basin, see App. 1. Through this system of canals, Petitioner controls stormwater from residential, urban and agricultural areas. J.A. 109. This system collects and channels massive quantities of destructive, phosphorus-enriched stormwater into the Everglades. S-9 discharges this phosphorus laden stormwater directly into WCA-3A. J.A. 98.

S-9 and C-11 are located in the C-11 Basin. Pet. Br. at 10. The United States Army Corps of Engineers ("COE") created the C-11 Basin, which encompasses 104 square miles, to "compartmentalize waters for management purposes." *Id.* The C-11 Basin was once part of the Everglades, but the COE converted it to "dry land" and it is now highly urbanized and industrialized. *Id.*

C-11 is an artificially created canal that runs from the Atlantic Ocean to WCA-3A. Pet. Br. at 10. WCA-3A is the portion of the Everglades that initially receives the polluted runoff from S-9. Stormwater runoff from the C-11 Basin is collected into C-11. *Id.* at 11. The water in C-11 contains higher levels of phosphorus than that which naturally occur in WCA-3A. Pet. App. 5a. As a result of the high levels of phosphorus, the Florida Department of Environmental Protection ("FDEP") listed C-11 as a water quality limited segment on its Section 303(d) list.[7] Florida

[7] The CWA requires states to identify waters that do not meet applicable water quality standards, and identify the pollutants causing

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Department of Environmental Protection, 1998 303(d) Report 32-33, *available at* http://www.dep.state.fl.us/water/tmdl/docs/303(d)-2.pdf 303 (last visited Nov. 3, 2003). Petitioner typically maintains the water level in C-11 between zero and four feet NGVD[8]. J.A. 71.

WCA-3A is also an artificial waterbody created by the COE. Pet. Br. at 8. WCA-3A is part of one of "three interconnected reservoir areas" that impounds water. Pet. Br. at 8. Levees L-33 and L-37, also projects of the COE, separate WCA-3A from, and maintain the water in WCA-3A at levels higher than, C-11. Pet. Br. at 8-9. Petitioner maintains the water elevation in WCA-3A at a level between 9.5 feet and 10.5 feet NGVD, which is at least five feet higher than the water level in C-11. *See* SFWMD, *Ecological Impacts of Drought in the Water Conservation Areas* 2 (Apr. 13, 2001), *available at* http://www.sfwmd.gov/org/wrp/wrp_evg/reports/drought_0401/generalinfo.pdf (last visited Nov. 9, 2003). WCA-3A is also listed as an impaired water on Florida's Section 303(d) list. 1998 303(d) Report, *supra*, at 33.

S-9 is an industrial-scale operation that is capable of moving water at a rate of 2,880 cubic feet per second (cfs).

the water quality threats. 33 U.S.C. § 1313(d)(1)(A)-(B). The waters identified by the states are referred to as water quality limited segments ("WQLS"), 40 C.F.R. § 130.2(j), and Section 303(d) of the CWA requires states to provide a list of WQLS to EPA (known as a § 303(d) list). C-11, also identified as the South New River Canal (waterbody identification # 3277A), is impaired as to nutrients, coliforms and dissolved oxygen. Florida Department of Environmental Protection, 1998 303(d) Report 33, *available at* http://www.dep.state.fl.us/water/tmdl/docs/303(d)-2.pdf 303 (last visited Nov. 3, 2003).

[8] "NGVD" means National Geodetic Vertical Datum.

J.A. 90. See App. 2 for a photograph of S-9. This rate exceeds the rate of flow of the St. John's River, one of the largest rivers in Florida. *See* USGS, *Calendar Year Streamflow Statistics for Florida*, *available at* http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02232400&agency_cd=US (last visited Nov. 3, 2003). When the water level in C-11 reaches four feet NGVD, or when heavy rainfall is predicted, Petitioner activates S-9, which pumps the stormwater across 60 feet of levees from east to west, reversing the natural flow of water, out of C-11, uphill, into WCA-3A. J.A. 54, 70-72, 90, 132-33.

Phosphorus-enriched water from C-11 contaminates water and soils on either side of S-9. J.A. 125-26. "Concentrations [at S-9] range from less than 20 parts per billion at low flows to *greater than 100 parts per billion* at high flows." J.A. 45 (emphasis added). S-9 discharged 5.4 metric tons of phosphorus in 1997 alone. J.A. 43. The areas surrounding S-9 are polluted. According to Dr. Jones: "The phosphorus concentrations are at their maximum levels. They can't get any higher than they are." J.A. 126.

An ecosystem already under stress is being further damaged by Petitioner's system of canals, levees and pumps that discharge phosphorus into the WCAs. J.A. 97, 98. Best management practices are not a panacea. Dr. Jones challenges: "[i]f anybody can demonstrate to me or find any place in the world where BMP has reduced the phosphorus concentration. . . . I would love to see it . . . it will not be enough." J.A. 123-24.



## II. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT S-9 REQUIRES A NPDES PERMIT UNDER § 301(a) OF THE CWA.

The central objective of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2003). To achieve this goal, Congress prohibited the discharge of any pollutant to navigable waters except in compliance with applicable permit requirements. 33 U.S.C. § 1311(a). The term "discharge of a pollutant" is defined in Section 502(12) and means "*any* addition of any pollutant to navigable waters from any point source." § 502(12); 33 U.S.C. § 1362(12) (emphasis added). Although Congress defined the terms "pollutant," "point source" and "navigable waters," it did not define "any addition." Thus, what constitutes an "addition" of a pollutant must be determined by a review of the facts of each case. *See Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994).

### A. S-9 Is a Point Source.

The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). No party disputes S-9 is a point source.[9]

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[9] Petitioner relies on *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Fed'n v. Consumers Power Co.*, 862 F. 2d 580 (6th Cir. 1988), for the proposition that S-9 does not add pollutants to waters of the United States. Pet. Br. at 27. However, this reliance is misplaced as the definitive question in *Gorsuch* and

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Pet. Br. at 2. Recognizing the goal of controlling pollution "at the source," courts have interpreted "point source" to mean any discernible, human-controlled structure, device or operation that adds pollutants to water.[10] EPA further defines "discharge of a pollutant" to include "surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." 40 C.F.R. § 122.2 (2003).

### B. C-11 and WCA-3 Are Physically Separate Waterbodies.

#### 1. Petitioner's Unitary Waters Theory Does Not Hold Water.

Petitioner does not dispute that C-11 and WCA-3A are waters of the United States. Pet. Cert. at 2. Petitioner argues instead that "the unique system of hydrologically connected surface and ground waters extending over 15,000 square miles in the Everglades," Pet. Br. at 6, is

*Consumers Power* was whether EPA's determination that dams should be categorized as nonpoint sources rather than point sources was entitled to deference. *See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 280 F.3d 1364, 1368 n.4 (S.D. Fla. 2002) (citing *Consumers Power*, 862 F. 2d at 584 and *Gorsuch*, 693 F. 2d at 175). Here, by contrast, EPA has not made a similar determination that pumping stations are not point sources.

[10] *See, e.g., Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (holding "diffuse run-off" that is channeled or collected is a point source); *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) (finding a culvert is a point source); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45-46 (5th Cir. 1980) (holding strip mining operation is a point source where rain erodes waste pile and carries away pollutants through naturally created ditches).



"part of a single navigable water." Pet. Br. at 46. By this logic, the Atlantic Ocean and the Everglades could be considered part of the same "unitary water," allowing Petitioner to pump saltwater into the Everglades without triggering the CWA.[11] Congress could not have intended such anomalous results.

#### 2. Florida Manages C-11 and WCA-3A as Separate and Distinct Waterbodies.

The State of Florida classifies C-11 and WCA-3A as separate waterbodies for purposes of watershed planning.[12] The Everglades is divided into different basins and waterbodies in recognition of the fact that water quality differs among the basins and therefore must be individually assessed and managed. FDEP, Florida's Water Quality Assessment 2002 305(b) Report 40, *available at* http://

[11] *Northern Plains Res. Council v. Fidelity Exploration & Prod. Co.*, 325 F.3d 1155, 1162 (9th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3148, 72 U.S.L.W. 3277, 72 U.S.L.W. 3280 (U.S. Oct. 20, 2003) (No. 03-257). In that case energy companies were pumping groundwater containing naturally occurring pollutants out of coal seams and discharging it into surface waters. The Ninth Circuit held that the unaltered groundwater was a pollutant that was added to another water body thereby triggering the permit requirements of the CWA.

[12] The Florida Water Plan is the FDEP's "principal planning tool for long-term protection of Florida's water resources." FDEP, Florida Water Plan: Implementing Watershed Management 1 (Dec. 2001), *available at* http://www.dep.state.fl.us/water/waterpolicy/docs/FWP_ Dec_ 2001_DO_NOT_EDIT.pdf. To implement this plan, FDEP divided the state's waters into 52 basins and those basins into 30 groups. EPA Region 4, Decision Document Regarding Department of Environmental Protection's § 303(d) List Amendment 4, *available at* http://www.epa.gov/region4/water/tmdl/florida/florida303d_update.pdf (last visited Nov. 4, 2003) [hereinafter 2003 303(d) Update].

www.dep.state.fl.us/water/docs/2002_305b.pdf (last visited Nov. 5, 2003). This management framework would be meaningless if all of the water within the Everglades was in fact one waterbody.

### 3. S-9 Pumps Stormwater Uphill from C-11 into WCA-3A.

S-9 moves massive quantities of water from C-11 into WCA-3A. Petitioner's system collects and controls stormwater in C-11. When the waters rise to four feet NGVD, as many as three S-9 pumps, powered by "large bulldozer engines," J.A. 153, with a combined velocity of 2880 cfs, kick on, lifting massive amounts of water up five to six feet, across 60 feet of levees, into WCA-3A. J.A. 72, 90, 132, 172. Contrary to Petitioner's assertion, this is not simply the passive movement of water from one place to another. Rather, it is the use of brute force to defy gravity, and reverse the natural flow of polluted stormwater from east to west into the Everglades.

## C. S-9 Adds Pollutants to Waters of the United States.

There is no question that phosphorous is a "pollutant," or that S-9 is a "point source," or that WCA-3A is a "water of the United States." Nor is there any doubt that phosphorous levels in WCA-3A are increasing as a result of the stormwater being pumped through S-9. Thus, the sole question is whether the fact that phosphorous is already in the stormwater before it is discharged through S-9 has any legal significance. Petitioner argues that the pollutant must originate "from" a point source. Pet. Br. at 26-27. For the following reasons, this argument lacks merit.



### 1. Plain Meaning of Addition.

Congress did not define "addition" in the CWA. Thus, it is appropriate to consider the plain meaning of "addition." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citing *F.M.C. Corp. v. Holliday*, 498 U.S. 52, 57 (1990)). The primary definition of "addition" is "the result of adding: anything added: INCREASE, AUGMENTATION." Webster's Third New International Dictionary (1971). S-9 *increases* phosphorus levels in WCA-3A above natural background levels. J.A. 35. Therefore, according to the plain meaning of the word "addition," the operation of S-9 results in the addition of a pollutant to WCA-3A.

### 2. Petitioner's Argument Distorts the Plain Meaning of Addition.

Petitioner argues that a discharge occurs only "when the pollutant originates from the point source, not when pollutants originating elsewhere are merely passed through." Pet. Br. at 26-27. This position is wrong as a matter of law and fact. First, there is nothing in the statute that requires that pollutants must "originate" in the point source. To the contrary, Congress broadly defined point source to mean any "confined and discrete conveyance." 33 U.S.C. § 1362(14) (emphasis added). Petitioner is attempting to put words into the statute that are not there.

Second, the Solicitor General rejected this interpretation, stating that the Eleventh Circuit "correctly rejected the notion that pollutants can be added 'from' a point source only if the point source itself generates or is the originating source of the pollutants." United States Br. at

13. Petitioner's argument would render Congress' definition of "point source" superfluous and attempts to backpedal from the admission that S-9 is a point source. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (holding Court is unwilling to adopt interpretations which render superfluous another portion of the same law).

Finally, it is not true that phosphorous simply "passes through" S-9 on its way to WCA-3A. In the absence of Petitioner's stormwater collection system and S-9, this phosphorous would be headed for the Atlantic Ocean. It defies common sense to argue there is no addition of phosphorous to the Everglades as a result of this human-controlled point source.

### 3. The Solicitor General Has Taken Inconsistent Positions on the "Addition" Issue.

After correctly disposing of the point source question, the Solicitor erroneously argues that there is no addition of phosphorous here because the Everglades is just one big water body. United States Br. in Opp'n Cert. at 13. Previously the United States has argued for a broad application of the term "addition" in CWA cases involving discharges of dredge and fill material under Section 404.[13] Just last

[13] *See United States v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000), *aff'd on reh'g*, 332 F.3d 698 (4th Cir. 2003) ("sidecasting" of dredge materials into wetlands constitutes "addition"); *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1503-06 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part*, 848 F.2d 1133 (11th Cir. 1988) (backwash from propellers constitutes "addition");
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term, for example, the Solicitor took the position in this Court that the "deep-ripping" of wetlands resulted in the addition of pollutants to waters of the United States, notwithstanding the fact that the pollutants did not originate outside the wetlands. *Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002). The petitioners in *Borden Ranch* argued that plowing wetlands did not involve any "addition" of a pollutant requiring a permit under Section 404 of the CWA "because their activities merely 'turn soil in place while adding nothing and redepositing nothing.'" *Brief for the Solicitor General at* 26, *Borden Ranch v. Army Corps of Eng'rs*, 537 U.S. 99 (2002) (No. 01-1243). The Solicitor argued this proposition was "wrong as a matter of fact and as a matter of law." *Id.* at 25. Especially relevant is the following statement: "[p]etitioner's suggestion that a 'discharge' does not occur unless the 'addition' constitutes 'new materials' transported from a distant site cannot be reconciled with the Clean Water Act's terms." *Id.* at 27.

The same is true for S-9. The Solicitor's suggestion that there is no addition of phosphorus because the Everglades is one waterbody amounts to an argument that the definition of addition is different for purposes of Section 404 than it is for Section 402. Such a position "cannot be reconciled with the Clean Water Act terms." *Id.* at 25. Congress used a single definition of discharge for both the Section 402 and Section 404 programs. The Solicitor's position confuses what is a well-settled area of the law.

*Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-25 (5th Cir. 1983) (mechanized land clearing constitutes "addition").

Further, the Solicitor's argument is inconsistent with the way EPA and FDEP actually implement the CWA in Florida. For example, Petitioner operates four Stormwater Treatment Areas ("STA"). SFWMD, 2003 Everglades Consolidated Report 4A-2 (Jan. 1, 2003). STAs treat stormwater to reduce the levels of phosphorus and then discharge the treated stormwater into the Everglades. *Id.* at 8B-17, 4-4. Recognizing that discharges from the STAs are a significant source of phosphorus in the Everglades, FDEP identified the STAs as Publicly Owned Treatment Works ("POTW") and issued NPDES permits to authorize the discharge of phosphorus by the STAs into the Everglades.

Unlike the STAs, Petitioner does not reduce the amount of phosphorus in C-11 before S-9 pumps the water into the Everglades. Because FDEP (and EPA, in its NPDES approval process) acknowledges that treated water discharged by the STAs constitutes the addition of a pollutant, Petitioner's position that the untreated stormwater pumped by S-9 does not constitute the addition of a pollutant is unsound.

## III. ALTERNATIVELY, S-9 SHOULD BE REGULATED AS A STORMWATER DISCHARGE UNDER 402(p)(2)(E).

In 1987, Congress amended the CWA and created a program to address stormwater[14] from agricultural, residential and industrial runoff. 33 U.S.C. § 1342(p).

[14] Stormwater is defined by the EPA as "storm water runoff, snow melt runoff, and surface runoff, and drainage." 40 C.F.R. § 122.26(b)(13).



Specifically, Congress determined that stormwater discharges should be controlled through the NPDES program. *Id.* Notably, Congress chose to include in this program discharges "for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E).

The express intent of Congress was to prohibit stormwater pollution through readily identifiable sources. 33 U.S.C. § 1342(p)(2)(A)-(D). Congress also recognized that this expansive approach would not address all sources of stormwater discharges. To ensure the program retained the requisite flexibility to achieve its goal, Congress enabled the Administrator or the State agency to designate other discharges on a case by case basis. 33 U.S.C. § 1342(p)(2)(E).

When designating a discharge under Section 402(p)(2)(E), the EPA guidelines state that:

> At a minimum Regions and States should consider *immediately designating* any storm water discharges as requiring an NPDES permit if the discharges are known/suspected to: . . . contribute significant amounts of pollutants to waters of the United States, *including sensitive wetlands, drinking water sources, estuaries, lakes, scenic rivers/streams, or near coastal areas that are highly valued natural resources.*"

Memorandum from James R. Elder, Director, Office of Water Enforcement Permits, Environmental Protection Agency 3 (Aug. 8, 1990) (emphasis added), reproduced at App. 3-21a. EPA also found that the "305(b) reporting process

is a critical source of information for making determinations under the authority of 402(p)(2)(E)." *Id.*

Through its Section 303(d) and 305(b) reporting requirements, FDEP has made a *de facto* determination that the stormwater pumped by S-9 into WCA-3A contributes to a violation of water quality standards. Therefore, a NPDES permit is required for S-9 under Section 402(p)(2)(E). S-9 discharges stormwater collected in C-11 into WCA-3A, which is a sensitive wetland, drinking water source, and a near coastal area that is a highly valued natural resource. J.A. 72. In fact, FDEP's 2002 305(b) Report lists the WCA as the first of the "largest and most important" wetlands in the state. 2002 305(b) Report, *supra*, at 73. Because WCA-3A is impaired as to phosphorus, any discharge of water containing phosphorus to WCA-3 contributes to a violation of Florida water quality standards. 1998 303(d) Report, *supra*, at 33. Therefore, Petitioner's discharge of stormwater via S-9 into WCA-3A is a discharge that must be regulated pursuant to Section 402(p)(2)(E) of the Act.

## IV. REGULATION OF S-9 IS COMPATIBLE WITH THE TMDL PROGRAM.

Petitioner also argues that the projects created to comply with the CWA's TMDL program "deal with the pollution problems caused by the S-9 and its related structures on a watershed wide basis" and that "[t]hese efforts are now in jeopardy of being trumped, their implementation at least seriously delayed, by a federal NPDES permitting process." Pet. Br. at 37. These statements are wrong as a matter of fact and law.



First, the NPDES program plays an integral part in the TMDL program and contributes to achieving water quality standards; any proposition that the NPDES program would harm the TMDL program is erroneous. Second, the "programs" the State and the District have established to "deal with the pollution problems caused by the S-9 and its related structure," Pet. Br. at 37, are not scheduled to be implemented for WCA-3A and the C-11 Basin until 2009. *See* EPA Region 4, Decision Document Regarding Department of Environmental Protection's 2003 § 303(d) List Amendment 4, *available at* http://www.epa.gov/region4/water/tmdl/florida/florida303d_update.pdf (last visited Nov. 4, 2003) [hereinafter 2003 303(d) Update].

Under the Florida Water Plan ("FWP") Florida designated WCA-3A and C-11 as "low priority" for purposes of TMDL implementation. Therefore, implementation of programs to address the continued pollution problems will not begin until 2009, at the earliest. 2003 303(d) Update, *supra*, at 4. Therefore, Florida's adoption of the FWP to implement the TMDL program will allow continued degradation of impaired water bodies until at least 2009. Because FDEP has identified the waterbodies of concern as water quality limited segments,[15] any additional loading of phosphorus is a violation of water quality standards and the CWA.[16] Such approach cannot, in good faith, be

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[15] According to the 1998 303(d) Report, C-11 (also known as South New River Canal) and a number of waterbodies within WCA-3A are listed as WQLS. The parameters (or pollutants) of concern are nutrients. 1998 303(d) Report 32-33. *See supra* note 7.

[16] 40 C.F.R. § 131.12 (containing the antidegradation policy).

described as a solution to the continued pollution problems caused by S-9.

Restoration of the Everglades requires a concerted effort by both state and federal governments. Petitioner agrees the area is undergoing devastating change due to phosphorus loading. It is incumbent upon all levels of government to employ whatever means are available to ensure the goal of protection is attained. However, the State and Petitioner in particular, have not employed all available mechanisms to address the devastation to the Everglades. The CWA requires S-9 be permitted under the NPDES program, which will allow Everglades restoration to begin in earnest by reducing phosphorus loading. The goal of the Clean Water Act is clear, and "the whole world is watching" to see if Everglades restoration will succeed. NPS, *Everglades National Park: Park Establishment, at* http://www.nps.gov/ever/eco/nordeen.htm.



## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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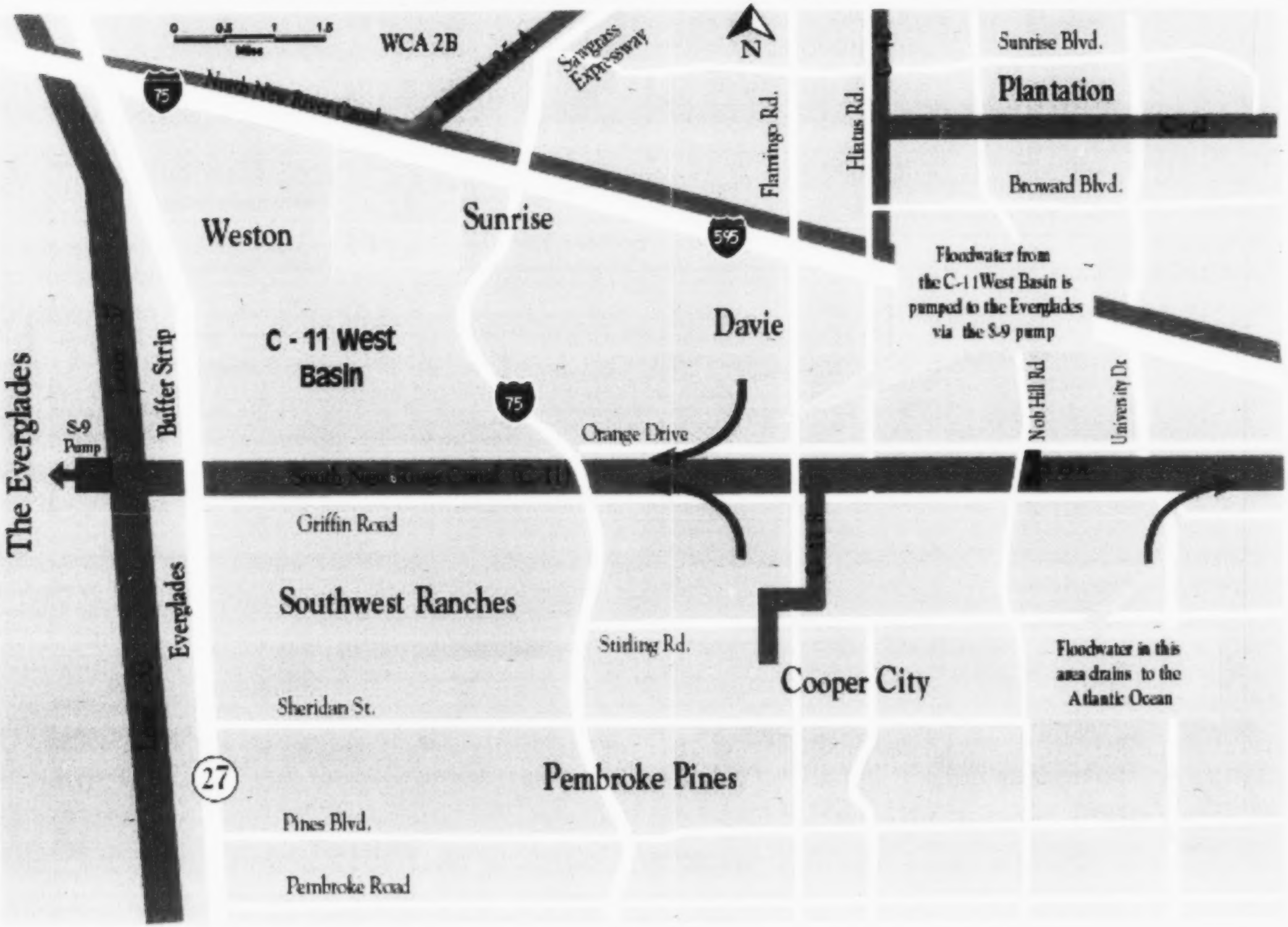
[17] Counsel wish to recognize the extraordinary effort of student clinicians Jason Hamilton, Spencer G. Hanes, Jr., Heidi Keeler Holland and Marguerite McConihe in the preparation of this brief.

# C-11 WEST CANAL IN CENTRAL BROWARD COUNTY

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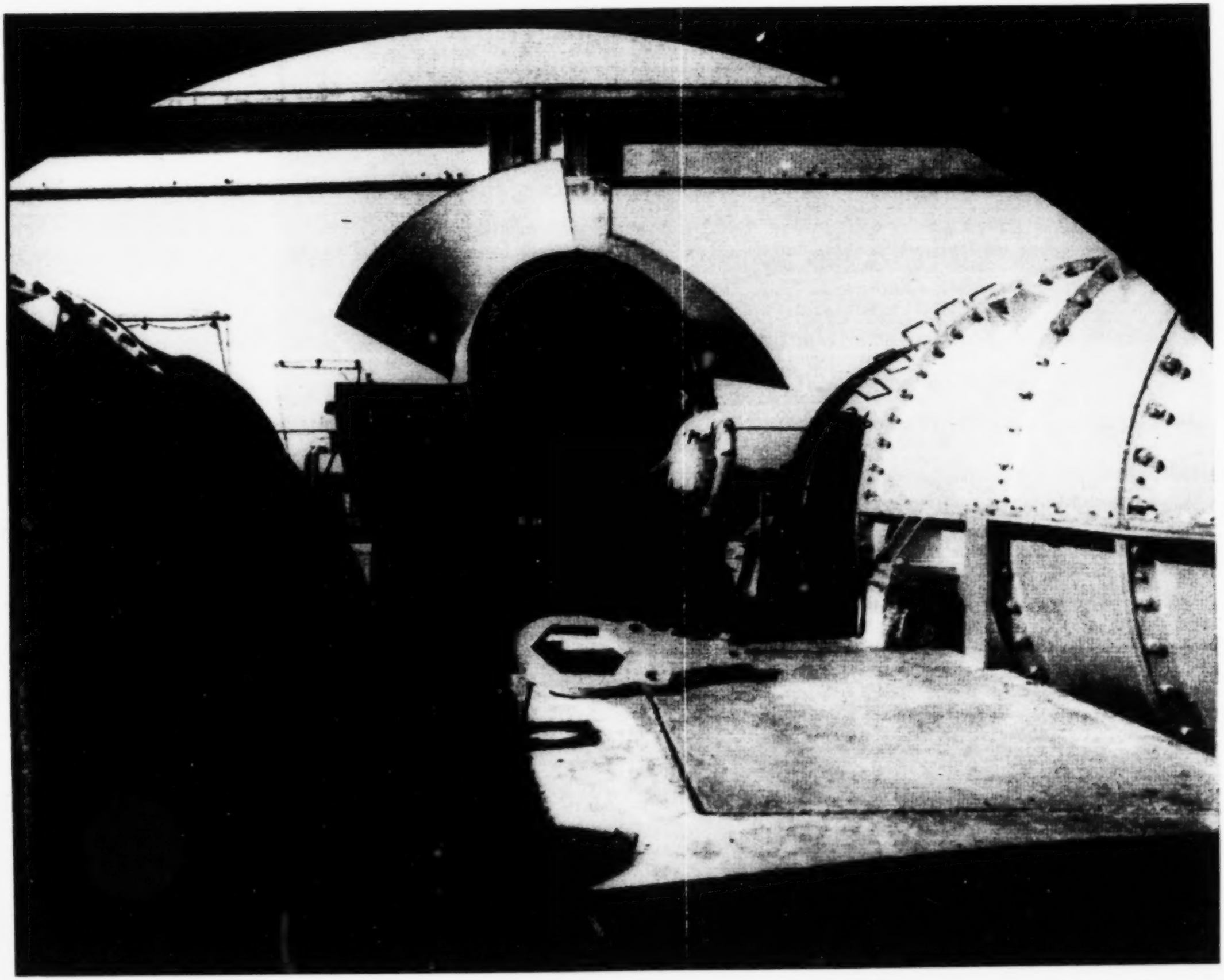

[LOGO] ATTACHMENT AVAILABLE UPON REQUEST

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C. 20460**

**OFFICE OF WATER**

Aug – 8 1990

MEMORANDUM

SUBJECT: Designation of Storm Water Discharges for Immediate Permitting

FROM: /s/ James R. Elder

James R. Elder, Director

Office of Water Enforcement and Permits

TO: Water Management Division Directors

Regions I – X

NPDES State Directors

The Water Quality Act of 1987 (WQA) provides EPA and NPDES States with new deadlines for the development of NPDES permit requirements for storm water and discharges. This memorandum is intended to inform Regional and State offices of the authority under the Act to continue or initiate efforts to permit storm water discharges that are causing environmental problems.

Background

Section 405 of the WQA amends the Clean Water Act (CWA) by adding section 402(p) to address storm water discharges. The Act provides a moratorium for certain storm water discharges from the requirement to obtain

permits until after October 1, 1992. However, there are specific exceptions to this moratorium:

(A) A discharge with respect to which a permit has been issued under section 402 before the date of enactment of section 402(p).

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more, but less than 250,000.

(E) A discharge for which the Regional Administrator or the State Director, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States.

The existing delegation of authority to Regional Administrators to issue and condition permits or to deny applications for permits for discharges pursuant to section 402 of the Clean Water Act includes the authority to implement section 402(p)(2)(E) (Delegations Manual 7/25/84, 2-20 NPDES). This authority may be redelegated to the Directors of the Regional Water Divisions, subject to the provisions of the 40 CFR 124 and 125.

Section 402(p)(2)(A) preserves the ability to enforce existing permits. On December 7, 1988 (53 *FR* 49416), EPA issued a notice of proposed rulemaking (NPRM) addressing permit application requirements for discharges



covered by sections 402(p)(2)(B) through (E). This memorandum will discuss implementation of section 402(p)(2)(E).

Discussion

Although EPA is currently amending regulatory requirements for permit applications for industrial and municipal storm water discharges, some storm water discharges have already been identified as representing significant sources of pollutants with discernible adverse effects on water quality and should be regulated through the permits program now. Regional Offices and NPDES approved States should designate those storm water discharges for permit issuance under the authority of section 402(p)(2)(E) as soon as possible after their impact is documented.

Storm water dischargers required to obtain an NPDES permit under section 402(p)(2)(E) can include dischargers from any conveyance or system of conveyances used for collecting and conveying storm water runoff including municipal separate storm sewer systems, storm water dischargers associated with industrial activity, and other dischargers from a point source. To be designated for a permit under section 402(p)(2)(E), the Administrator, or in States with approved NPDES programs, the Director, must determine that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

Section 502(14) of the CWA defines the term "point source" broadly to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure,

container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." Many courts have supported broad interpretations of this term, for example, the court in *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41 (5th Cir. 1980) found that conveyances formed either as a result of natural erosion or by material means, and which constitute a component of a drainage system, were point sources.

However, it should be noted that agricultural storm water discharges and return flows from irrigated agriculture are specifically excluded from the CWA definition of point source, and cannot be designated for a permit under section 402(p)(2)(E). In addition, Section 402(1)(2) prohibits EPA from requiring an NPDES permit for discharge of storm water runoff from mining operations or oil and gas operations composed entirely of storm water which is not contaminated by contact with, or does not come into contact with any overburden, raw material, intermediate products, finished product, by-product or waste products located on the site of such operations. Storm water discharges from mining operations or oil and gas operations which meet the criteria of section 402(p)(2)(E) as being either a significant contributor of pollutants to waters of the United States or contributing to a water quality standard violation either will be contaminated by contact with, or will have come into contact with overburden, raw material, intermediate products, finished product, by-product or waste products located on the site of such operations.

At a minimum, Regions and States should consider immediately designating any storm water discharges as



requiring an NPDES permit if the discharges are known/suspected to:

1. Contribute to a violation of a water quality standard for a waterbody segment listed under section 304(l)(1)(B), or contribute significant amounts of pollutants to any waterbody segment listed under sections 304(l)(1)(A), 319(a)(1), or 314(a)(1)(F)[1].

2. Contribute significant amounts of pollutants to waters of the United States, including sensitive wetlands, drinking water source, estuaries, lakes, scenic rivers/streams, or near coastal areas that are highly valued natural resources.

3. Originate from municipal separate storm sewer systems that have, or are suspected of having, process waste or sanitary wastes discharged to them.

4. Originate from municipal separate storm sewer systems that are suspected of containing a significant contribution of pollutants.

The four categories presented include (but are not limited to) discharges which require storm water permits. Each category is described and further clarified using example case histories categorized in the following pages.

---

[1] Many discharges of pollutants associated with urban runoff, construction, mining, agricultural (feedlots), and waste disposal have traditionally been considered nonpoint sources. However, legally, storm water from these sources discharged through conveyances are point sources under the CWA.

1. **CONTRIBUTE TO A VIOLATION OF A WATER QUALITY STANDARD FOR A WATERBODY SEGMENT LISTED UNDER SECTION 304(l)(1)(B), OR CONTRIBUTE SIGNIFICANT POLLUTANTS TO ANY WATERBODY SEGMENT LISTED UNDER SECTIONS 304(l)(1)(A), 319(a)(1), OR 314(a)(1)(F).**

   **A. Contribute to a violation of a water quality standard for a waterbody segment listed under section 304(l)(1)(B), or contribute significant amounts of pollutants to any waterbody segment listed under section 304(l)(1)(A).**

Section 304(1) of the CWA requires States to develop three lists of related waters impaired by toxic and nontoxic pollutants. The first list (section 304(l)(1)(A)(i)) includes waters that will not achieve numeric water quality standards for the 126 priority pollutants identified as toxic pursuant to section 307(a) of the CWA after application of CWA technology-based requirements. The second list (section 304(l)(1)(A)(ii)) is a comprehensive list of waters impaired by any pollutant from any source such that the water is not meeting the *goals of* the CWA after application of technology-based requirements. The section 304(l)(1)(B) list consists of those waters which, after application of technology-based requirements, are not expected to achieve numeric or narrative water quality standards due entirely or substantially to point source discharges of any of the 126 priority toxic pollutants. The fourth list (section 304(l)(1)(C)) is a list of point sources affecting the waterbodies on the section 304(l)(1)(B) list. On this fourth list, States must identify the specific point sources discharging the toxic pollutant responsible for the listing, and provide an individual control strategy (ICS) for



each source. The statutory language for section 304(l)(1) is as follows:

> "State list of Navigable Waters and Development of Strategies . . .
>
> (A) a list of those waters within the State which after the application of effluent limitations required under section 301(b)(2) of this Act cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 303(c)(2)(B) of this Act, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;
>
> (B) list of all navigable waters in such state for which the State does not expect the applicable standard under section 303 of this Act will be achieved after the requirements of sections 301(b), 306, and 307(b) are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 307(a);
>
> (C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source."

Waterbodies may be listed under section 304(l) because of storm water discharges associated with urban runoff, construction site runoff, mining runoff, or other runoff categories which contribute to a water quality standard violation. For waterbodies listed on the section 304(l)(1)(B) list, States or EPA must have identified the specific point source discharging the toxic pollutant by June 4, 1989. States must have developed an individual control strategy (ICS/NPDES permit) by June 4, 1989 or EPA in cooperation with States must have done so by June 4, 1990. If the storm water discharge does not have an NPDES permit that will control the point source and bring the waterbody into compliance with State water quality standards, then the discharge should be designated under section 402(p)(2)(E). After designation, the ICS should have been developed by June 4, 1990 in accordance with 304(l) regulatory requirements established on June 2, 1989 (54 *FR* 23868).

Paragraph (A)(ii) of section 304(l)(1) includes a listing of waterbodies which, after application of technology-based limits, fail to meet applicable water quality standards that assure the attainment of designated uses and the fishable/swimmable goals of the CWA. This list is comprehensive (i.e. it is not limited to waterbodies impaired by toxic pollutants); and where storm water discharges impair these listed waters, the storm water discharge should be considered for designation and permit issuance under section 402(p)(2)(E).

Example

The lower Duwamish River, which empties into the Puget Sound in Washington, has been categorized as having



extremely poor water quality partly attributable to metals contamination. The major causes of the river's condition are industrial discharges, polluted storm water discharges, overland runoff, and combined sewer overflows. As a result, the lower Duwamish River was originally included on Washington's section 304(l)(1)(B) list. As part of the Puget Sound Estuary Program's activities, storm water discharges were characterized for pollutant loadings of metals and organics. Several storm drains were listed due to metals contributions under section 304(l)(1)(C). Since the original listings were submitted, however, the State has suggested that storm drains be delisted. If any storm drains remain on the section 304(l)(1)(C) list, an ICS/NPDES permit will be developed. For storm drains not listed, additional information should be collected; and if this information shows a contribution to a water quality impairment, such storm water discharges should be designated for permitting under section 402(p)(2)(E).

**B. Contribute significant pollutants to any waterbody segment listed under section 319(a)(1).**

Many storm water discharges have traditionally been considered to be nonpoint sources of pollution because of their diffuse and intermittent nature. Legally, however, they are considered point sources if discharged from a conveyance. Section 319(a)(1)(A) of the CWA requires States to identify in Nonpoint Source Assessment Reports those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or goals and requirements of the CWA. Section 319(a)(1)(B) requires States to

identify those categories and subcategories of nonpoint sources which add significant pollution to navigable waters identified under section 319(a)(1)(A). These lists were required to be developed by States by August 4, 1988. Similarly, section 305(b) requires that water quality impacts from diffuse sources be identified. Discharges from storm water point sources may be classified in categories such as urban runoff or construction site runoff in these reports. The statutory language of section 391(a)(1) is as follows:

> "The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which:
>
> (A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of the Act;
>
> (B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;"

As previously stated, identifiable categories under section 319(a)(1)(B) may include discharges that are associated with urban runoff, construction site runoff, mining runoff, etc. (i.e., those categories that are identified in the State Nonpoint Source Assessment Reports). After a State's Nonpoint Source Assessment Report is approved by



the Regional Administrator, storm water discharges covered by section 402(p), which may be listed in the section 319 assessment that impact listed waterbodies, should be considered for designation under section 402(p)(2)(E).

Example

The Minnesota Pollution Control Agency lists Ryan Creek in its State Nonpoint Source Assessment Report as being impacted solely by storm sewers and surface runoff. The Report also lists Shingle Creek as being impacted by land development, storm sewers and surface runoff. Those storm water discharges that contribute to the impairment could be considered for designation and permitting under section 402(p)(2)(E).

**C. Contribute significant pollutants to any waterbody segment listed under section 314(a)(1)(F).**

As required by section 314, each State will conduct a two-part study to determine a lake's condition and develop methods and strategies for restoration and protection. Such information will specify the location and loading characteristics of significant sources polluting the lake. The statutory language appears in the following lines;

> "Each State on a biennial basis shall prepare and submit to the Administrator for his approval –
>
> (F) an assessment of the status and trends of water quality in lakes in such State, including but not limited to, the nature and extent to which the use of lakes is impaired as a result of such pollution, particularly with respect to toxic pollution."

In accordance with section 314(a)(1)(F), States have already submitted Lake Water Quality Assessment Reports. These reports, in many cases, document the impact of storm water discharges on lakes, and were included as part of the State 305(b) Report. Where this information is provided in an Assessment Report that has been approved by the Regional Administrator, any storm water discharges included in the section 314(a)(1)(F) assessment (such as urban runoff, construction site runoff, mining runoff, etc.) which impact a given waterbody should be considered for designation under section 402(p)(2)(E).

Example

In the 1988 Lake Water Quality Assessment Report, the Illinois Environmental Protection Agency lists Levings Park Lagoon, Winnebago County as being water quality limited and partially supporting of one or more designated uses with moderate impairment. The principal source of impairment has been identified as urban runoff. Therefore, discharges resulting from the urban runoff that impact the Levings Park Lagoon could be considered for designation under section 402(p)(2)(E).

**2. SIGNIFICANTLY IMPACT SENSITIVE WETLANDS, DRINKING WATER SOURCES, ESTUARIES, LAKES, OR NEAR COASTAL AREAS THAT ARE HIGHLY VALUED NATURAL RESOURCES.**

Under section 402(p)(2)(E), the Regional Administrator or State Director must determine whether a storm water discharge contributes to a violation of a water



quality standard or is a significant contributor of pollutants to waters of the United States. Based on such a determination, 402(p)(2)(E) designations should be considered for storm water discharges that significantly impact certain waters that warrant special consideration such as wetlands, lakes, scenic rivers/streams, high quality headwaters, estuaries, or coastal regions. Such waterbodies are often spawning, feeding, and nursery grounds for various species, and include sensitive habitats such as mangrove marshes, seagrass beds, and coral reefs. Storm water may enhance eutrophication of these water bodies, and contribute to an overall deterioration in water quality. BOD loads will generally lower the dissolved oxygen (DO) in receiving waters. Petroleum hydrocarbon loads in receiving waters may result from storm water discharges. Sediment loading from storm water runoff can settle to cover spawning habitat or can shade submerged vegetation and limit photosynthesis. Lakes and estuaries have long detention times and tend to concentrate nutrients, such as phosphorous and nitrogen, and other pollutants in the muds and water columns. Where such water bodies are significantly impacted by storm water discharges, these discharges should be considered for designation. The Regional Administrator or NPDES State Directors may use the Lake Water Quality Assessment Reports and other available information necessary to prioritize impacted waterbodies for discharge designation.

Example

The quality and productivity of the Chesapeake Bay and its tributaries have declined due to the impact of human activity that has caused increased levels of pollutants, nutrients, and toxics in the Bay system and declines in

protective land uses, such as forested and undeveloped lands. Shoreline areas of the Bay system are particularly sensitive and susceptible to adverse impacts due to storm water discharges. Where storm water discharges, such as urban runoff, construction site runoff, mining runoff, etc., have been determined to represent a significant source of pollutants to a segment of the Bay or a particular stream segment of a Bay tributary, the discharge could be considered for designation under section 402(p)(2)(E).

### 3. MUNICIPAL SEPARATE STORM SEWERS THAT ARE KNOWN TO HAVE OR SUSPECTED OF HAVING PROCESS WASTE OR SANITARY WASTES DISCHARGED TO THEM.

Studies have shown that many storm sewers contain illicit discharges of non-storm water. In some municipalities, illicit connections of sanitary, commercial and industrial discharges to storm sewer systems have had a significant impact on the water quality of receiving waters. Removal of these discharges presents opportunities for improvement in the quality of storm water discharges.

Under the proposed storm water permit application regulations, municipalities with separate storm sewers serving a population over 100,000 must submit a management plan that requires screening for illicit discharges and improper disposal. Municipal separate storm sewer systems with identified improper discharges that significantly impact receiving waters should be considered for designation under section 402(p)(2)(E). Once designated, the affected municipality will be responsible for submitting a permit application. The permitting authority may request the municipality to submit a description of a storm water management plan, or any aspect of a management



plan that may call for monitoring and screening for illicit connections and improper discharges. Such plans are to include subsequent measures for the removal and elimination of such known discharges. The following examples document cases where such problems existed and where improvement in water quality was achieved following the elimination of illicit connections. It is important to note that the section 402(p)(2)(E) designation authority can be used to require NPDES permits for any size municipal separate storm sewer system or specific discharges points within the system. This authority may be useful to address municipal separate storm sewer systems that serve populations of less than 100,000, since those cities are not required to file applications for storm water permits before October 1, 1992.

Example

One recent study performed in Ann Arbor, Michigan concluded that illegal and improper industrial and commercial point source connections to storm drains represents a significant source of pollutants in storm water discharges. Half of the businesses investigated in Ann Arbor had at least one storm drain connection through which potentially hazardous pollutants could enter the storm sewer. Significant improvements in water quality were realized as these connections were removed and the flows shifted to sanitary sewers. Over two-thirds of auto-related businesses such as repair shops, tire stores, service stations and body shops, and half of the car washes investigated had illegal or improper connections to the storm drainage system. Similar municipal separate storm water systems should be considered for designation under section 402(p)(2)(E).

Example

The City of Fort Worth has begun a surveillance program to curb illegal dumping of industrial and domestic waste into the city's estimated 200 storm drains that feed streams flowing to the Trinity River. Over a period of one year, 57 cases of illegal waste dumping by businesses and industries were investigated. Eighteen cases of improper connection of domestic sewage lines to storm drains were discovered. The city has implemented corrective measures and several citations have been issued to violators. The surveillance effort was initiated, after a series of devastating fish kills plagued the Trinity River. Monitoring has shown that diesel fuel, chemical solvents, pesticides, raw sewage and chlorine are present in storm water discharges. Similar storm water corrective measures could be required after the municipal system is designated under section 402(p)(2)(E).

## 4. MUNICIPAL SEPARATE STORM SEWER DISCHARGES THAT ARE SUSPECTED OF CONTAINING A SIGNIFICANT CONTRIBUTION OF POLLUTANTS.

The characterization of storm water discharges in terms of concentrations and pollutant loads viewed together with water quality standards and National Urban Runoff Program (NURP) data derived from typical urban runoff characteristics, provides an indication of whether the discharge is a significant contributor of pollutants. For instance, the mean concentration is defined as the total constituent mass discharge, divided by the total runoff volume for a rainfall event. These simplified approximations can be used as the basis for designation as a significant contributor of pollutants. Where such specific



information is lacking for a particular municipality, NURP data can be used to make initial screening estimates of pollutant loads associated with municipal separate storm sewers. Using the NURP recommendations for load estimates provided in Attachment A, pollutant loadings can be calculated for a range of pollutant concentrations. As municipal dischargers provide a more accurate estimate of pollutants based on site specific data and the use of more sophisticated models, such as the Storm Water Management Model (SWMM), pollutant concentrations and loads can be compared to NURP and other estimates. Based on the resulting characterizations, discharges from municipal separate storm sewer systems that contain a significant contribution of pollutants can be determined and, where appropriate, considered for 402(p)(2)(E) designation.

Procedures for Designation

On January 12, 1989, (54 *FR* 246), EPA published a final rule which codified portions of section 402(p), including section 402(p)(2)(E), into EPA regulation at 40 CFR 122.26(a). In addition to December 7, 1988 (53 *FR* 49416), EPA proposed revisions to procedures at 40 CFR 124.52 for designating storm water discharges on a case-by-case basis. Until EPA promulgates these regulations, procedures for case-by-case designations should be modeled after existing regulatory procedures at 40 CFR 124.52. The Regional Administrator, or in States with approved NPDES programs, the Director, will notify the discharger in writing that the discharge is being considered for designation and the reasons for the consideration. In addition, an application form is to be sent with the notice.

Until EPA promulgates specific permit application requirements for storm water discharges, operators of storm water discharges considered for designation under section 402(p)(2)(E) should generally submit Form 1 and Form 2C permit applications. For designation of discharges from a municipal separate storm sewer system, Form 1 and Form 2C applications for each outfall may not be appropriate. In this case, the permitting authority may request the applicant to submit information modeled after the permit application requirements for large and medium municipal separate storm sewer systems proposed in the December 7, 1988, notice.

Deadlines for submitting permit applications will be established on a case-by-case basis. Although a 60-day period from the date of notice for submitting a permit application may be appropriate for many designated storm water discharges, site specific factors may dictate that the Regional Administrator or NPDES State provide additional time for submitting a permit application. For example, due to the complexities associated with designation of a municipal separate storm sewer system for a system- or a jurisdiction-wide permit, the Regional Administrator or NPDES State may provide the applicant with additional time to submit relevant information or may require that information be submitted in phases.

Attachment B contains example reports from the "Waterbody System," which is an information system which retains the results of the section 305(b) reports. The 305(b) reporting process is a critical source of information for making determinations under the authority of section 402(p)(2)(E). The data system is now only partially implemented, but beginning with the 1990 305(b) reporting cycle should contain the assessment data for all States.



Regional Offices and States can use data from the 305(b) Waterbody System, the 1988 Lake Water Quality Assessment Report, and other available information characterizing storm water discharges to make determinations under the authority of section 402(p)(2)(E). The permitting procedures should commence as soon as the impact from storm water discharges is recognized. In addition, when industrial permits that regulate only non-storm water discharges expire, they should be evaluated to determine whether storm water discharges need to be addressed.

If you have any questions regarding this matter, please contact Cynthia Dougherty at FTS/202 475-9545 or have your staff contact Mike Mitchell at FTS/202 475-7057.

Attachments

cc: LaJuana S. Wilcher
Robert H. Wayland III
Martha Prothro
Tudor Davies
Dave Davis
Geoff Grubbs
NPS Coordinators

NOV 14 2003

(30)

**NO. 02-626**

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# In The
# Supreme Court of the United States

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SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE COALITION OF GREATER MINNESOTA CITIES AND THE CITY OF SAINT CLOUD, MINNESOTA IN SUPPORT OF RESPONDENTS

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35

## QUESTION PRESENTED

Whether the transfer of untreated water containing pollutants from a source water body to another, naturally distinct destination water body constitutes an "addition" of pollutants under the federal Clean Water Act, 33 U.S.C. Section 1251, *et seq.*, where the water from the source water body could not enter the destination water body *but for* the transfer activity of a point source.

## TABLE OF AUTHORITIES

**Cases** **Page**

*Appalachian Power Company v. Train*,
545 F.2d 1351 (4th Cir. 1976).....11-12

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,
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513 U.S. 873, 115 S.Ct. 198 (Mem.),
130 L.Ed.2d 130 (1994).....5, 12-15

*Dague v. City of Burlington*, 935 F.2d 1343
(2nd Cir. 1991).....17



## TABLE OF AUTHORITIES – CONTINUED

**Page**

*DuBois v. United States Department of Agriculture*,
102 F.3d 1273 (1st Cir. 1996).....*passim*

*In the Matter of the Saint Cloud Wastewater Treatment Plant NPDES Permit*,
No. 7-2200-14439-2 (Minn. Off. Admin. Hrngs. October 31, 2002).....3

*Miccosukee Tribe of Indians, et al. v. South Florida Water Management District*,
280 F.3d 1364 (11th Cir. 2002).....*passim*

*National Wildlife Federation v. Consumers Power Company*,
862 F.2d 580 (6th Cir. 1988).....*passim*

*National Wildlife Federation v. Gorsuch*,
693 F.2d 156 (D.C. Cir. 1982).....*passim*

*Northern Plains Resource Council v. Fidelity Exploration and Development Co.*,
325 F.3d 1155 (9th Cir. 2003) .....17-18

## TABLE OF AUTHORITIES – CONTINUED

**Statutes and Regulations** **Page**

Clean Water Act of 1977, § 502(12),
33 U.S.C. § 1362(12).....8, 14-15

Minn. Stat. § 115.03.....1

Minn. R. 7050.0211.....1



## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, the Coalition of Greater Minnesota Cities (the "CGMC") and the City of Saint Cloud, Minnesota ("St. Cloud") request leave to file the accompanying brief as *amici curiae* in support of Respondents on the writ of certiorari granted to Petitioner South Florida Water Management District, which seeks reversal of the lower court's decision in *Miccosukee Tribe of Indians, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002). Consent for *amici* participation was requested of all parties on November 13, 2003, and granted on the same date.

## INTERESTS OF *AMICI CURIAE*

*Amici curiae* submit this brief in support of Respondents on the writ of certiorari granted to Petitioner South Florida Water Management District, which seeks reversal of the lower court's decision in *Miccosukee Tribe of Indians of Florida, Sam Poole v. South Florida Water Management District; Friends of the Everglades v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1] *Amici* wish to clarify proper application of the Clean Water Act to inter-basin transfers of untreated water, and the alleged "split" among the federal circuits on this question.

The Coalition of Greater Minnesota Cities (the "CGMC") is an association of 72 city governments located throughout the State of Minnesota. The City of Saint Cloud, Minnesota ("St. Cloud") is a political subdivision of the State of Minnesota and a CGMC member city. St. Cloud and most other CGMC cities treat residential, commercial and industrial wastewater through publicly owned treatment works (POTWs), which operate under five-year National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) permits issued by the Minnesota Pollution Control Agency (MPCA) pursuant to Clean Water Act delegation.

Since January 2001, St. Cloud has been involved in

[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.



litigation regarding the re- issuance of the NPDES permit for its POTW, which had last been re-issued in 1994. As discussed below, a key issue in that litigation is whether St. Cloud's phosphorus discharge, which goes directly to the Mississippi River, could be held to "affect" the Vadnais Chain of Lakes ("Vadnais Chain"), a hydrologically distinct set of waters (i.e., not connected to the Mississippi River), solely because the City of Saint Paul ("St. Paul") withdraws water from the Mississippi River and deposits that untreated water into the Vadnais Chain. Because of the potential adverse impacts of Mississippi River water on the more sensitive Vadnais Chain, St. Paul treats the river water to reduce phosphorus, a nutrient that would cause excessive algae growth in those lakes. St. Cloud is not held responsible for the cost of treatment by St. Paul because it is the action of St. Paul, not St. Cloud, that impacts water quality in the Vadnais Chain.

If the Eleventh Circuit's decision is reversed on the issue of these so-called "inter-basin transfers," it would result in St. Cloud, CGMC member cities and cities throughout the country being held liable for otherwise compliant levels of pollutants in their discharge entering hydrologically distinct waters, solely because of transfer activities conducted by third parties. These third parties would in effect reap the benefits of the water transfers, while imposing the detriments of their actions on others, contrary to the arguments made by other *amici curiae*. No federal circuit has ever supported this position.

In 1973, the MPCA adopted a regulation designed to control point source discharges of phosphorus into waters of the state, known as the "Phosphorus Rule." The Phosphorus Rule provides that "where the discharge of

effluent is directly to or affects a lake or reservoir, phosphorus removal to one milligram per liter (1 mg/L) shall be required." Minn. R. 7050.0211, subp. 1a.

St. Cloud's POTW discharges directly to the Mississippi River, roughly 60 miles north of the Minneapolis-St. Paul metropolitan area. St. Paul withdraws water from the Mississippi River at a pumping station located at Fridley, a northern suburb of Minneapolis. The river water withdrawn by St. Paul, treated to reduce pollutants that could adversely impact the Vadnais Chain, is then deposited into the Vadnais Chain to augment St. Paul's drinking water supply. The Mississippi River and the Vadnais Chain are naturally distinct navigable waters with no natural connection. Water from the Mississippi River can enter the Vadnais Chain only by means of St. Paul's pumping station activity.

On December 26, 2000, the MPCA issued St. Cloud's draft NPDES permit for public review and comment. The MPCA did not recommend a 1 mg/L phosphorus limit pursuant to the Phosphorus Rule, because the St. Cloud WWTF discharges directly to a river and the MPCA could not demonstrate that St. Cloud's phosphorus discharge affects any downstream lake or reservoir, as required by the Phosphorus Rule. The Minnesota Center for Environmental Advocacy (MCEA), a local environmental group, petitioned for a contested case hearing on the draft permit in January 2001. Among the allegations made by the MCEA was that St. Cloud's phosphorus discharge is transported in the Mississippi River 60 miles downstream to Fridley, where the river water containing phosphorus is withdrawn by St. Paul's Fridley pumping station, then deposited in the Vadnais



Chain. Based on this transfer, MCEA argued, St. Cloud's phosphorus discharge "affects" the Vadnais Chain, and a phosphorus limit is required.

The MPCA granted MCEA's request for a contested case hearing and referred the matter to an Administrative Law Judge (ALJ). After the completion of discovery, St. Cloud moved for summary disposition on September 5, 2002, alleging that MCEA had produced no evidence to suggest that St. Cloud's phosphorus discharge affected any downstream lakes or reservoirs because, *inter alia,* it is St. Paul, not St. Cloud, that discharges to the lakes. The MPCA joined in St. Cloud's motion, and MCEA opposed the motion.

St. Cloud relied on the Eleventh Circuit's decision in *Miccosukee* for the proposition that St. Cloud's phosphorus discharge could not "affect" the Vadnais Chain, because water from the Mississippi River could not enter the Vadnais Chain *but for* St. Paul's intervening transfer action. Assuming that St. Cloud's phosphorus discharge actually traveled the 60 miles downriver from St. Cloud to Fridley, it was St. Paul's pumping station, and not St. Cloud's POTW discharge, that became the point source "adding" phosphorus, and therefore "affecting," the Vadnais Chain through the transferred river water.

On October 31, 2002, the ALJ granted St. Cloud's motion for summary disposition and made a recommendation consistent with the *Miccosukee* decision to the MPCA Citizens' Board. The ALJ's recommended order quoted *Miccosukee* and held that because of the transfer between basins, the Phosphorus Rule could not be applied to find that St. Cloud's phosphorus discharge "affects" the Vadnais Chain. The MPCA adopted the

ALJ's recommended order on December 19, 2002, and MCEA appealed the decision to the Minnesota Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed in part, reversed in part, and remanded the matter for a contested case hearing. As the ALJ had done before, the Court of Appeals specifically quoted *Miccosukee*, and it specifically affirmed the decision of the ALJ and the MPCA Citizens' Board on the ruling that St. Paul, and not St. Cloud, was the point source legally responsible for any phosphorus in untreated water removed from the Mississippi River by St. Paul and deposited into the Vadnais Chain.

A reversal of the Eleventh Circuit's holding in *Miccosukee* on the point of inter-basin transfers – that is, of the holding that a point source is *not* legally responsible for pollutants contained in water drawn from one basin and then deposited into another, hydrologically distinct basin – would have the practical effect of holding upstream point source dischargers, including most CGMC members and St. Cloud, legally responsible for the effects of their discharges in hydrologically disconnected waters, even where such effects result from the intervening actions of downstream transfers beyond their control.

It would be illogical to interpret the Clean Water Act in this manner, and the federal circuits are consistent in their interpretation of the Act to prevent such a result. The Clean Water Act's forbearance to regulate the allocation of water for public uses through the NPDES regime has nothing to do with the NPDES program's regulation of the pollutants in those waters – the two inquiries are completely separate. Similarly, the Clean Water Act's regulation of pollutants "added" to navigable waters by



point sources does not inquire as to the original sources of those pollutants. Where the pollutants enter the water body only because of the transfer activity, the transferor's responsibility under the Clean Water Act for such action should be triggered. For these reasons, the CGMC and St. Cloud respectfully request leave to file the attached brief *amici curiae*.

Respectfully submitted,

Dated: 11/14/03

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## TABLE OF CONTENTS

**Page**

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES .....ii

MOTION FOR LEAVE TO FILE BRIEF
*AMICI CURIAE*.....v

INTERESTS OF *AMICI CURIAE*..... .....vi

FACTUAL BACKGROUND.....1

SUMMARY OF ARGUMENT.....4

ARGUMENT .....7

I. Federal Circuit Court Decisions Agree That Intra-Basin Transfers Within The Same Navigable Water, Such As From One Side Of A Dam To Another, Do Not Require An NPDES Permit.....7



## TABLE OF CONTENTS – CONTINUED

**Page**

II. Federal Court Decisions Agree That Inter-Basin Transfers Between Naturally Distinct Navigable Waters, Where The Source Water Could Not Enter The Destination Water But For The Activity Of A Point Source, Require An NPDES Permit For The Point Source Conducting The Transfer .....11

CONCLUSION.....20

## FACTUAL BACKGROUND

The City of St. Cloud operates a POTW that discharges directly to the Mississippi River. It is undisputed that St. Cloud does not discharge directly to a lake or reservoir. As the operator of a wastewater treatment facility, St. Cloud is required to hold an NPDES permit, which is periodically renewed by MPCA pursuant to MPCA's NPDES delegation. *See* Minn. Stat. § 115.03, subd. 5. The MPCA promulgated the Phosphorus Rule 30 years ago to address the adverse impact of phosphorus in lakes and reservoirs due to excessive algal growth. The Phosphorus Rule provides, in relevant part:

> Where the discharge of effluent is directly to or affects a lake or reservoir, phosphorus removal to one milligram per liter shall be required....

Minn. R. 7050.0211, subp. 1a (2001).

Because St. Cloud does not discharge directly to a lake or reservoir, the 1 mg/L effluent limit found in the Phosphorus Rule can apply to St. Cloud only if its discharge of phosphorus "affects a lake or reservoir." In the time since MPCA adopted the Phosphorus Rule, St. Cloud's NPDES permit has been reissued five times. Before the MCEA challenged the draft permit in 2001, neither MPCA nor any other party had claimed that St. Cloud was subject to the phosphorus effluent limit found in the Phosphorus Rule.

In January 2001, MCEA requested that MPCA hold a contested case hearing regarding the reissuance of St. Cloud's NPDES permit. The issue certified for a contested case was "whether the discharge of phosphorus from the St. Cloud wastewater treatment plant will affect a lake or reservoir." Among other arguments, MCEA contended that the 1 mg/L limit should be applied to St. Cloud because St. Cloud's phosphorus discharge allegedly affects the Vadnais Chain of Lakes. The Vadnais Chain is not connected to the Mississippi River. Water from the Mississippi River reaches the Vadnais Chain only because the City of St. Paul extracts water from the Mississippi River at its Fridley pumping station, treats it, and artificially transfers it into the Vadnais Chain.

St. Cloud moved for summary disposition on September 5, 2002, arguing among other things that MCEA had failed to establish 1) that St. Cloud discharges to the Vadnais Chain of Lakes, and 2) that St. Cloud's discharge has a measurable effect on algal levels on a downstream lake or reservoir. St. Cloud made this argument in reliance on the instant case.[1] With respect to the Vadnais Chain, the ALJ granted summary disposition because St. Cloud does not "discharge" to the Chain. The ALJ decided, as a matter of law, that "when St. Paul intervenes to pump Mississippi

[1] St. Cloud also relied on the cases identified by the Eleventh Circuit in *Miccosukee* in support of its opinion, including *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988), *DuBois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001), discussed *infra*.



River water into the Vadnais Chain of Lakes, St. Paul becomes the discharger of that water and St. Paul is responsible for any pollutants contained in that water." *In the Matter of the Saint Cloud Wastewater Treatment Plant NPDES Permit*, No. 7-2200-14439-2 (Minn. Off. Admin. Hrngs. October 31, 2002). The Minnesota Court of Appeals affirmed on this point in an unpublished opinion.

## SUMMARY OF ARGUMENT

The Petitioner in the instant case claims that the Eleventh Circuit decision, and the *Catskill Mountains* and *DuBois* decisions upon which it relies, will have the practical effect of further stressing an already overburdened NPDES program by requiring millions of dams, levees, canals and diversion structures to obtain NPDES permits to avoid Clean Water Act violations, at an enormous cost to taxpayers. Other *amici*[2] similarly argue that a deep divide exists among the federal circuits about the application of the Clean Water Act's NPDES permitting provisions to transfers of untreated water within a water body or between water bodies for such purposes as drinking water, irrigation, or flood control.

Contrary to these assertions, we submit that the "but for" test applied by the Eleventh Circuit in the instant case is consistent with the decisions of other circuits on the matter of intra-basin and inter-basin transfers, holding that Clean Water Act liabilities are triggered by action. We urge this Court to recognize that failing to hold transferors of untreated water between naturally distinct water bodies accountable under the Clean Water Act for the adverse effects associated with the transferred water subjects upstream sources to liability for downstream acts of third

[2] *See* Brief of *Amici Curiae* The City of New York, the Association of Metropolitan Water Agencies, the National Association of Flood and Stormwater Management Agencies, the American Water Works Association, and the Association of Metropolitan Sewerage Agencies in Support of Petitioner (filed September 10, 2003).



parties. This result would occur even where 1) the upstream discharge is already regulated by an NPDES permit and is in full compliance with Clean Water Act requirements, and 2) the transfer between naturally distinct water bodies occurs without any action by, and often without the knowledge of the upstream point source. On this point, the circuits are consistent: the downstream party transferring (*i.e.*, "discharging") the pollutants is responsible for these impacts.

Since the *Gorsuch* decision in 1982, the federal circuit cases addressing transfers of untreated water by point sources have for the most part fallen into two lines: *intra*-basin transfers for which an NPDES permit would not be required (*National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 165 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Company,* 862 F.2d 580, 584 (6th Cir. 1988)), and *inter*-basin transfers for which requiring the transferor to obtain an NPDES permit would be an appropriate application of Clean Water Act authority (*Committee to Save Mokelumne River v. East Bay Municipal Utility District,* 13 F.3d 305 (9th Cir. 1993), *DuBois v. United States Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1996), and *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2nd Cir. 2001)). The guiding principle running through each case is that where the water bodies in question are naturally, hydrologically distinct – that is, water could not move from one body to the other without the intervening action of a point source – the federal circuits have subjected the transferring point sources to NPDES regulation. This triggers an evaluation of the pollutant impacts associated with the point source. Evaluating pollutant impacts does

not affect rights to the water; it merely requires that the incidental adverse impacts associated with the water transfer be addressed.

Using the Clean Water Act's NPDES permitting mechanism to limit the transfer of pollutants contained in untreated water from one water body to another, naturally distinct water body is consistent with the purposes of the Act. The NPDES program's forbearance to regulate transfers of waters for public purposes has nothing to do with its regulation of point sources adding pollutants to navigable waters, regardless of where those pollutants may have originated. Therefore, the Eleventh Circuit's reasoning with regard to inter-basin transfers and use of a "but for" analysis should be affirmed, regardless of how the remainder of the Petitioner's claims are decided.



## ARGUMENT

### I

### Federal Circuit Court Decisions Agree That Intra-Basin Transfers Within The Same Navigable Water, Such As From One Side of A Dam To Another, Do Not Require An NPDES Permit.

Despite claims to the contrary in the instant case, the distinction between intra-basin and inter-basin transfers *is* significant and fundamental to the exercise of NPDES authority, certainly from the standpoint of an upstream point source that operates under an NPDES permit. The long-simmering question of whether the NPDES requirements of the Clean Water Act apply to discharges from dams and similar impoundments came to a head in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). Seeking a declaratory judgment against the Environmental Protection Agency (EPA) on the subject, the National Wildlife Federation (NWF) pointed out that when a river is dammed, and water from the reservoir behind the dam is then released back into the river channel, this can induce a number of significant water quality changes, including but not limited to low or high dissolved oxygen, sediment, dissolved substances, and water with temperatures above or below those in the downstream river channel. *Id.* at 161-164.

The D.C. Circuit identified five elements in the

Clean Water Act's definition of "discharge of a pollutant" that must be satisfied in order for a point source to require an NPDES permit: "(1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*." 693 F.2d at 165; *see also* Clean Water Act § 502(12), 33 U.S.C. § 1362(12). The parties stipulated that dams can at times be "point sources" and that both the rivers and the reservoirs behind them could be "navigable waters"; their dispute was over what constitutes "pollutants," and whether passing allegedly pollutant-laden water from one side of a dam to another constitutes an "addition" "from" a point source. *Gorsuch,* 693 F.2d at 165. The D.C. Circuit noted:

> EPA argues, on the other hand, that for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world; dam-caused pollution, on the other hand, merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river).

*Id.* After consideration of evidence presented by both parties, the D.C. Circuit appropriately deferred to the EPA's definitions of the term "pollutants" and its construction of the term "addition," concluding that the EPA's construction of these terms in the Clean Water Act, as evidenced by the statutory text and the Act's legislative history, was reasonable. *Id.* at 177. This deference was also based on the Clean Water Act's legislative purpose, and the Court's finding that not requiring NPDES permits



for dams does not frustrate the purpose of the Act. *Gorsuch,* 693 F.2d at 179. The D.C. Circuit concluded that

> if dam-induced pollution was truly of major proportions, someone, be it EPA, the National Wildlife Federation, or other environmental groups, would most likely have brought it to Congress' attention, either in 1972 or 1977. And of course, the National Wildlife Federation, if unhappy with our attempt to divine what Congress would have done about dam-caused pollution had it thought about it, is still free to seek a legislative solution. Unless and until Congress addresses the matter, we cannot say that the Act requires EPA to adopt the strictest possible regulatory solution.

*Id.* at 182.

The Sixth Circuit applied the five-element definition used by the D.C. Circuit in *Gorsuch* and accorded similar deference to the EPA, this time with the guidance of *Chevron*, to the EPA's construction of the term "addition", given that EPA had utilized a reasonable construction of a statute that the EPA is assigned to administer. *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580, 584 (6th Cir. 1988); *see also Chevron, U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). In this context, it was not unreasonable for the EPA to conclude that the withdrawal of water containing live fish from Lake Michigan, and the re-release of water containing living and dead fish back

into Lake Michigan through electric generation turbines, did not constitute an "addition" of pollutants from the outside world. *Consumers Power Co.*, 862 F.2d at 585-6; *accord Gorsuch*, 693 F.2d at 165.

In both *Gorsuch* and *Consumers Power Co.*, the water body in question did not change: one involved the transfer of water from one side of a dam to another, the other involved the cycling of water in and out of the same lake. Contrast these with the situation faced by St. Cloud, where the waters of the Mississippi River and the Vadnais Chain of Lakes would not intermingle under natural conditions, and that of other POTWs whose discharge may be redirected downstream by the actions of third parties.

Petitioners in the instant case assert that their water management equipment, including the S-9 pump at issue, "are merely tools used to move water and determine the quantity of water in different parts of the system. Without the levee system, the managed waters would naturally flow together as a sheet across south Florida." This is likely true; nonetheless, the Eleventh Circuit's reasoning that a point source is the cause-in-fact of the "addition" of pollutants to a naturally distinct water body when it deposits polluted water from another water body remains sound, assuming that these are naturally *distinct* waters.

Numerous point sources discharge process water of varying quality; POTW's frequently discharge wastewater that is cleaner and freer of pollutants than the receiving waters. The Clean Water Act, however, does not distinguish the need to obtain an NPDES permit based upon the quality of the discharge: the "discharge" is defined as "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A)



(emphasis added). For purposes of whether NPDES regulations apply, a point source can keep pollutants out of a discrete navigable water or let them in, regardless of where the pollutants originated. A point source can be, and often is, a gatekeeper. If the principle of holding point sources responsible for the effects of inter-basin transfers is abandoned on the facts of *Miccosukee*, the transfer of polluted water from one basin to another could continue unabated regardless of its detrimental effects, undercutting the purposes of the Act.

## II

**Federal Circuit Court Decisions Agree That Inter-Basin Transfers Between Naturally Distinct Navigable Waters, Where The Source Water Could Not Enter The Destination Water But For The Activity Of A Point Source, Require An NPDES Permit For The Point Source Conducting The Transfer.**

Petitioner asserts that the "but for" test represents a radical departure from the EPA's traditional construction of the term "addition."[3] This is simply untrue. In support of this assertion, Petitioner discusses *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976). While the Fourth Circuit did note that "those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an

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[3] *See* Petition for a Writ of Certiorari, South Florida Water Management District (filed October 21, 2002), at 15.

addition of pollutants by a plant through which they pass," the Fourth Circuit is silent on the issue of whether the "naturally occurring" constituents were being added to another, naturally discrete water to which the pollutants would not otherwise have traveled. *Appalachian Power Co.*, 545 F.2d at 1377. The "cooling ponds and lakes" at issue in *Appalachian Power Co.* appear to be artificially constructed waters created through dams, where water would be drawn from the pond, cycled through condensers, and then returned to the pond for cooling. *Id.* at 1357-8.

*Appalachian Power Co.* does not change the distinction between passing pollutants *through* connected waters, and depositing waters containing pollutants *into* naturally distinct waters. The first may not be a point source discharge; the second always is. The first line of cases involved transfers within or between naturally connected waters, or *intra*-basin transfers; therefore a "but for" analysis would not apply.

An example of the second line of cases, *inter*-basin transfers, can be found in *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993). In this case, a facility designed to collect, pump and recirculate highly contaminated drainage from an abandoned zinc and copper mine through a series of reservoirs, primarily the Mine Run Dam Reservoir, contained a spillway that allowed occasional overflows of polluted water into the Mokelumne River during heavy rainfalls. *Id.* at 307.

The Ninth Circuit distinguished *Gorsuch* and *Consumers Power Co.* by pointing out that, first, these cases did *not* categorically exempt all dams from the Clean Water Act's point source regulatory authority. *Mokelumne*



*River*, 13 F.3d at 308. Second, unlike the release of water from one side of a dammed river channel to the other (*Gorsuch*) or the withdrawal from and return of water to the same water body (*Consumers Power Co.*), the District's reservoirs were naturally distinct bodies designed to collect acid mine drainage. *Id.* It was the incidental release of this drainage that introduced pollutants into the Mokelumne River; therefore, this spillage constituted the "addition" of pollutants from the outside world requiring an NPDES permit. *Id.* at 308.

A clearer example, and one that St. Cloud's situation typifies, may be found in *DuBois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). A, a proposed ski facility expansion in New Hampshire would involve drawing water from Loon Pond, the East Branch of the Pemigewassett River and Boyle Brook to make snow. *Id.* at 1296. Used water from all three sources would then be pumped back into Loon Pond. *Id.* The district court had reasoned that since the East Branch and Loon Pond were both "waters of the United States," they were to be treated as a "singular entity" and could not be considered separately. *Id.* Similarly, the U.S. Forest Service argued that because water from Loon Pond flows out through the East Branch, the waters were "naturally connected" waters of like quality; therefore an NPDES permit was not required for the transfer. *Id.* at 1297.

Relying on *Gorsuch*, *Consumers Power Co.* and *Mokelumne River*, the First Circuit rejected both the "singular entity" and "hydrological connectedness" arguments. With regard to the first, the First Circuit pointed out that pollutants from the East Branch would never enter Loon Pond naturally; although connected, they

are separate bodies of water with a single direction of flow. *DuBois*, 102 F.3d at 1297. Considering both to be a "singular entity" would frustrate the purpose of the Clean Water Act. *Id.*

The Forest Service's "hydrological connectedness" argument also failed because the First Circuit found no evidence in the Clean Water Act of a distinction between "unrelated" and "hydrologically connected" waters; the Act simply refers to "any addition of any pollutant to navigable waters from any point source." *Id.* at 1298; *see also* 33 U.S.C. §1362(12)(A). Further – and as the First Circuit notes, "more compellingly" – simply looking at the direction of flow *from* Loon Pond *to* the East Branch logically indicates that pollutants could not get *into* Loon Pond *from* the East Branch unless someone put them there. Again, the First Circuit focused on the nuance that *but for* the activity of the intervening point source – in this case, the ski facility's snowmaking pump – pollutants from the East Branch could not possibly enter Loon Pond; therefore an "addition" of pollutants could not have occurred. 102 F.3d at 1298.

The First Circuit's rejection of the analyses offered by the district court and the U.S. Forest Service is instructive. The fact that the East Branch and Loon Pond *were* connected indicates that the presence or absence of a natural connection between the source and destination waters does not tell the whole story. As discussed in *Gorsuch*, the "discharge of a pollutant" means "(1) a pollutant must be (2) *added* (3) to navigable waters (4) *from* (5) a *point source*." 693 F.2d at 165; *see also* Clean Water Act § 502(12), 33 U.S.C. § 1362(12). *Mokelumne River* established that the point source need not create the



pollutant but only discharge it. *See Mokelumne River*, 13 F.3d at 308.

*DuBois* confirms this, and adds the dimension that the diversion of flow by a point source, even when the waters are interconnected, can constitute an addition of pollutants from a point source where the pollutants would not have entered the destination water *but for* the action of the point source.

In the decision below, the Eleventh Circuit confirms that the definition of "discharge of a pollutant" can neither be so restrictive as to exclude pollutants not originating from the point source, nor so expansive as to always include dams and other devices that merely pass along water containing pollutants within or between connected waters. *Miccosukee*, 280 F.3d at 1371. A "but for" test strikes this balance, although it should be noted that the St. Cloud example does not even need this deep an analysis. The Mississippi River and the Vadnais Chain of Lakes are not connected in any way except by St. Paul's pumping station; therefore it becomes the easiest case for comparison and the plainest example of the "but for" test at work.

The *amici* brief filed by the City of New York and others heavily criticizes *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001). Since before World War II, the City of New York has diverted water from the Schoharie Reservoir (behind the Schoharie Dam) through the Shandaken Tunnel, into Esopus Creek, which in turn empties into the Ashokan Reservoir, from which the City draws its drinking water supply. *Id.* at 484. Were it not for the Shandaken Tunnel diversion, water from the Schoharie Reservoir

would flow into Schoharie Creek and eventually the Hudson River, and waters from Schoharie Creek and Esopus Creek would never intermingle until they eventually both flowed into the Hudson River. *Catskill Mountains*, 273 F.3d at 484.

The Second Circuit criticized the application of *Chevron*-style deference, such as that given in *Gorsuch* (although *Gorsuch* pre-dated *Chevron*) and *Consumers Power Co.*, to informal EPA policy statements that have not involved formal action, *e.g.*, notice-and-comment rulemaking. 273 F.3d at 491. In interpreting the term "addition," however, the Second Circuit ultimately reached a conclusion perfectly consistent with *Gorsuch*, *Consumers Power Co.* and subsequent decisions:

> The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. Here, water is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sediment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.



*Catskill Mountains*, 273 F.3d at 492. Citing a consistent decision in *Dague v. City of Burlington*, 935 F.2d 1343 (2nd Cir. 1991), the Second Circuit explicitly rejected, as the First Circuit had in *DuBois*, any implication of a "singular entity" theory that may be drawn from *Gorsuch* and *Consumers Power Co. Catskill Mountains*, 273 F.3d at 491-92. Indeed, a "singular entity" theory would render the word "addition" in the Clean Water Act meaningless because any interconnected waters could be viewed in this manner. *Id.* at 492.

*Amici curiae* the City of New York and others argue that extending the *Catskill Mountains* "ladle in the soup pot" analogy excludes consideration of waters coming from above or below, e.g., acid rain or tainted groundwater. This contention is addressed in *Northern Plains Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155 (9th Cir. 2003). Fidelity was extracting coal-bed methane, and in this process groundwater containing a number of chemicals was released into the Tongue River. *Id.* at 1157. The parties stipulated that four of the five elements necessary to prove a Clean Water Act violation were satisfied: there was a (1) discharge (3) from a point source (4) to a navigable water (5) without an NPDES permit. *Id.* at 1159-60. The only issue remaining was whether the groundwater, unaltered by Fidelity but nonetheless containing chemicals that degraded the water quality of the Tongue River, constituted a "pollutant." *Id.* The Ninth Circuit answered this question in the affirmative. *Id.* at 1162. It went on to point out that the mere transport of unadulterated water from one body to another can in fact violate the Clean Water Act, as was held in the present case, *Catskill Mountains*, and *DuBois*.

*Northern Plains*, 325 F.3d at 1163.

It may very well be correct, as the City of New York asserts, that the Eleventh Circuit erred in requiring an NPDES permit for the pumping of water from one side of a levee to another, in Everglades waters that were once a single, continuous sheet. That distinction in the *Catskill* case, however, is inapposite. The Shandaken Tunnel diverts water, and the pollutants in the water, from Schoharie Creek to Esopus Creek. Were it not for this diversion, the two creeks would not have intermingled at any point before reaching their respective confluences with the Hudson River. The same "but for" test applies in *Catskill Mountains, DuBois,* and *Mokelumne River*.

If, therefore, *Miccosukee* were reversed, the reversal should only go to the point that the transfer of water by the S-9 pump was from one side of a levee to another, rather than from one discrete body of water to another. In other words, *Miccosukee* would shift from fitting into the second line of cases (*inter*-basin transfers) to fitting into the first (*intra*-basin transfers). A reversal should not be used as a lever by which to exempt all transfers of untreated water from NPDES regulation, as some *amici* have urged, because some of these transfers can and do result in the "addition" of pollutants by point sources to navigable waters: precisely the type of activity the Clean Water Act is designed to address.

The Eleventh Circuit in the instant case couched the "but for" test in such a way that strikes harmony between intra-basin and inter-basin transfers:

> When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water but for the change in flow caused by the point source, an addition of pollutants from a point source occurs.



*Miccosukee*, 280 F.3d at 1368-69.

Rather than upending two decades of Clean Water Act law, the application of the "but for" test captures point source discharges to naturally distinct waters, even where the point source is not producing the pollutants in the transferred water, but continues to exclude dams and similar devices that merely shift, hold, or move water among interconnected or indistinct bodies, even where those waters may contain pollutants. The effects of the "but for" test are not nearly so severe as the Petitioners and others claim.

Overturning the "but for" test, on the other hand, could have dramatically adverse effects on existing POTWs that are currently in compliance with Clean Water Act requirements. If a point source transfers untreated water from one distinct basin to another, and the pollutants contained in the untreated water are carried from one distinct water to another, yet the point source performing the transfer is considered not to be "adding" pollutants under the Clean Water Act, then the focus would shift to upstream point sources. This would subject every upstream

point source to a risk of increased liability, despite full compliance with NPDES permits and other Clean Water Act regulations. Upstream POTWs would be forced to adopt expensive mitigating measures to remedy harm caused not by their own actions, but by those of a single downstream point source.

The St. Cloud case provides an instructive example of how the absence of a "but for" test could affect upstream point sources. As discussed earlier, Mississippi River water enters the Vadnais Chain of Lakes only because St. Paul pumps water from the river, treats it and then transfers it to the lakes. It is the actions of the St. Paul facility alone, and not the river's natural flow or the actions of St. Cloud, that allow additional phosphorus loads associated with Mississippi River water to enter the Vadnais Chain of Lakes. As long as the *but for* test holds, it is reasonable to conclude that St. Cloud is not a discharger to the Vadnais Chain within the meaning of Minnesota's Phosphorus Rule. As the ALJ in the St. Cloud case stated, "when Saint Paul intervenes to pump Mississippi River water into the Vadnais Chain of Lakes, Saint Paul becomes the discharger of that water and St. Paul is responsible for any pollutants contained in that water." This follows the logic of *Miccosukee*, *Catskill Mountains,* and *DuBois*, and that logic is well founded.

## CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge the Court to affirm the decision of the Court of Appeals for the Eleventh Circuit, with regard to the issue of



inter-basin transfers. The Court should uphold the proposition that where a point source 1) changes the natural flow of a body of water and causes it to flow into another navigable water into which it would not otherwise have flowed, and 2) the pollutants contained in the transferred water would not have entered the other navigable water *but for* the change in flow, then 3) the transferor of water becomes the cause-in-fact of the discharge of pollutants and an "addition" of pollutants from a point source occurs, requiring the transferor to obtain an NPDES permit.

Respectfully submitted,

Dated: 11/14/03

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In The
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## AMICUS CURIAE BRIEF OF TONGUE & YELLOWSTONE RIVER IRRIGATION DISTRICT, TONGUE RIVER WATER USERS' ASSOCIATION, AND NORTHERN PLAINS RESOURCE COUNCIL, INC. IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether a pollutant is "added" to waters of the United States when water containing a pollutant is discharged into a hydrologically distinct body of water with which it would otherwise never intermingle.

2. Whether the United States' contention that an "addition" occurs but once, upon a pollutant's initial entry into a navigable water, is supported by either the text or the purpose of the Clean Water Act.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| INTERESTS OF *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 5 |
| CONCLUSION | 15 |




TABLE OF AUTHORITIES


Page

CASES

*Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001).....3, 5, 8, 9, 10

*Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) .....12

*DuBois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996).....8, 10

*Miccosukee Tribes v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).....1, 13

*National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988).....5, 7, 12

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).....5, 7, 12, 13

*Northern Plains Resource Council, Inc. v. Fidelity Exploration & Production Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied* (Oct. 20, 2003).....2, 11

*United States v. Mead Corp.*, 533 U.S. 218 (2001) ..... 6

*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)..... 3

STATUTES

33 U.S.C. § 1251(a) .....3, 5

33 U.S.C. § 1251(g) ..... 4

33 U.S.C. § 1311(a)..... 5

33 U.S.C. § 1342.....5, 12

33 U.S.C. § 1362(12) ..... 5

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. § 1362(7) ..... 7

33 U.S.C. § 1362(8) ..... 7

OTHER AUTHORITIES

AMERICAN HERITAGE DICTIONARY 394 (2d ed. 1979) ..... 6

Brief Opposing the Petition for the United States as *Amicus Curiae* ..... 14



## INTERESTS OF *AMICI CURIAE*

*Amici Curiae* Tongue & Yellowstone Irrigation District, the Tongue River Water Users' Association, and Northern Plains Resource Council, Inc. respectfully submit this brief supporting the lower court's decision in *Miccosukee Tribes v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1] Written consent for *Amici Curiae* participation in this case was granted by counsel of record for the parties and is filed with the Clerk.

*Amicus Curiae* Tongue & Yellowstone Irrigation District (hereinafter "the District") is the holder of the oldest major water right on southeastern Montana's Tongue River, a river that has become the focal point of a debate over the discharge of coalbed methane wastewater. *Amicus Curiae* Tongue River Water Users' Association sells water to the District for irrigation. The District diverts water through the Twelve-Mile Dam into the T&Y Ditch, which provides water to hundreds of irrigators in the lower Tongue River watershed. *Amicus Curiae* Northern Plains Resource Council, Inc. (NPRC) is a nonprofit organization whose members include many farmers and ranchers who irrigate from streams and rivers in southeastern Montana.

*Amici* irrigators have a significant stake in this Court's interpretation of "addition" under the Clean Water

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[1] In accordance with Supreme Court Rule 37.6, *Amici Curiae* affirm that no counsel for any party in this case authored this brief in whole or in part, and that no persons or entities other than *Amici* or their counsel have made a monetary contribution specifically for the preparation or submission of this brief.

Act. *Amici* were thrust into Clean Water Act litigation when oil and gas producers decided it was economically justifiable to develop the extensive coalbed methane (CBM) reserves in southeastern Montana. CBM development results in the production of massive quantities of salty wastewater from deep underground, which must somehow be disposed of. Fidelity Exploration & Production Company, the first CBM producer in Montana, opted to discharge that wastewater directly into the Tongue River and its tributaries. NPRC filed suit against Fidelity over those unpermitted discharges, and the parties litigated the issue of whether CBM wastewater is a "pollutant" under the CWA. The Ninth Circuit held that it is, and this Court denied Fidelity's petition for certiorari. *Northern Plains Resource Council, Inc. v. Fidelity Exploration & Production Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied* (Oct. 20, 2003).[2] The District and the Association appeared as *Amici* in this Court and the court below.

Because members of *Amici* depend on high-quality surface waters for their livelihoods as ranchers and farmers, they seek the protections afforded to them by the CWA. If EPA's interpretation of "addition" is adopted by this Court, *Amici* fear the long-term effects on their water quality could be disastrous.

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[2] The production of coal bed methane gas requires dewatering underground aquifers. The pumped ground water is a useless byproduct of the commercial extraction process, and in the *Northern Plains* case was discharged as wastewater into streams and rivers used for irrigation.



## SUMMARY OF ARGUMENT

One of the primary goals of the CWA is to maintain the integrity of the nation's waters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (noting the overall goal of CWA is to maintain and improve water quality and preserve ecological integrity of our nation's waters). "Addition" must be interpreted consistently with that goal as well as with the plain language of the statute. EPA's interpretation of the "outside world" would allow high-quality waters to be degraded simply because the pollutant being discharged was already contained in waters of the United States. One polluted water could thereafter pollute all other waters, simply because the pollutant was present in a navigable water – regardless of whether the discharged water would ever have reached the receiving water naturally.

The Clean Water Act commands the EPA to not only restore but "maintain" "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). *Amici* urge this Court to respect the plain language of the CWA, and interpret "addition" in a manner that respects both the text of the statute as well as the underlying purpose articulated therein. Although Petitioner and its *Amici* may wish for a different outcome based upon policy grounds, it is not this Court's role to change the meaning of an ordinary word such as "addition" in order to achieve a particular policy goal. As stated by the Second Circuit in addressing this very issue, "Where a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer." *Catskills Mountains Chapter of Trout Unlimited v. City of New*

*York*, 273 F.3d 481, 494 (2d Cir. 2001). Section 101(g) of the Clean Water Act[3] may provide sufficient textual support for a policy-based exemption from NPDES permitting for state water management agencies without having to wrest a distorted meaning from the word "addition."

The only contested issues presented herein are whether water that contains a pollutant is "added" to the WCA-3 when discharged through the S-9 pumping station, and if so, whether the statute exempts state-controlled water diversions for water management and flood control. SFWMD may not have created the pollution, but it does discharge the pollutant. CWA liability attaches to dischargers.

*Amici* urge the Court to affirm the Eleventh Circuit on the "addition" issue, and limit any application of section 101(g) to states or governmental entities who are moving water for purely public purposes.

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[3] Section 101(g) states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g).



## ARGUMENT

### I. The S-9 Pumping Station "Adds" a Pollutant to WCA-3.

The Clean Water Act (CWA) was enacted to "restore *and maintain* the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). Under the plain language of the Clean Water Act, an NPDES permit is required when (1) a pollutant (2) is added (3) to navigable waters (4) from (5) a point source. 33 U.S.C. §§ 1311(a), 1342, 1362(12); *see also National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 582 (6th Cir. 1988). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *See* 33 U.S.C. § 1362(12).

It is undisputed that water in the C-11 Basin contains higher levels of phosphorus than the WCA-3 receiving water. Whether SFWMD is the actual polluter or not, it is the entity responsible for the discharge of phosphorus into the WCA-3 via a point source. Although SFWMD argues that the point source must add the pollutant, this is an extreme position not supported by the United States and rejected by the Eleventh Circuit herein, the Second Circuit, *Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001), and the D.C. Circuit, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 n.58 (D.C. Cir. 1982).

Thus, four of the five elements required for CWA liability are present: phosphorus is a pollutant, WCA-3 is a navigable water, the S-9 pumping station is a point source, and the pollutant reaches WCA-3 from that point source. The only dispute is whether the pollutant is an "addition."

### A. Common Sense And Science Should Determine "The Outside World."

To "add" means to join or unite. AMERICAN HERITAGE DICTIONARY 394 (2D ED. 1979). Thus, the CWA requires an NPDES permit when a pollutant *joins* a navigable water via a point source. In the words of EPA, an "addition" occurs when a pollutant enters navigable waters from "the outside world." The issue presented by this case is whether "the outside world" is to be defined artificially, based upon the waters' legal status, or by applying common sense aided by rudimentary science.

A definition based entirely upon the waters' legal status is unabashedly, unworkably artificial. Under this view, espoused by the United States herein, liability attaches only once, at the moment a pollutant first enters the waters of the United States:

> The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a different part is not a "discharge of a pollutant" within the meaning of the Act.

Brief for United States Supporting Petitioner at 19 (emphasis in original). This position – never adopted by the EPA in formal rulemaking and therefore deserving of limited deference, *United States v. Mead Corp.*, 533 U.S. 218 (2001) – misreads the plain language of the CWA, and renders the explicit goal of maintaining the integrity of our nation's waters an absurdity.



Waters of the United States include, for instance, the territorial seas. 33 U.S.C. § 1362(7). The territorial seas extend out from the coast for three miles. 33 U.S.C. § 1362(8). Thus, under EPA's analysis, pumping water from the Chesapeake Bay into the James River in western Virginia would not constitute an "addition" of a pollutant – as long as the pipe did not add any pollutants to the water. No matter that salt and nitrogen, among other substances, would be added to the James River *for the first time* – in EPA's view, the important point is that those pollutants are not entering navigable waters for the first time. Once present, they can never be "added" again.[4]

The United States insists that waters that are merely "conveyed" or "connected" should not be subject to NPDES permitting. But unless this approach is restricted within the confines of either the dam cases[5] or section 101(g), its consequences for western irrigators could be disastrous.

As explained by the Second Circuit, this interpretation:

> would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water

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[4] It is not clear whether, in EPA's view, the receiving water must be the first navigable water to *contain* a pollutant, or the first navigable water into which a pollutant is *discharged*. The distinction is important in the hypothetical given, for salt is not a pollutant in the Chesapeake Bay, but it is most definitely a pollutant in the James River. So at what point is it "added" to navigable waters?

[5] *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

> from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word 'addition.'

*Catskills Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001); *accord DuBois v. U.S. Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996).

*DuBois* vividly illustrates the artificiality of EPA's position and the necessity of defining "addition" with at least some relation to the real world. Stream water containing phosphorus as well as the organism *Giardia lambia* was to be pumped (upstream) into a pristine mountain lake, Loon Pond. The pond not only supported a "rich variety of life in its ecosystem" but was also the major source of drinking water for a nearby town. 102 F.3d at 1277. The district court applied the rationale put forth by the EPA herein, i.e., that no "addition" had occurred because the pollutants in the streamwater were already in waters of the United States – even though they would never reach Loon Pond naturally. The First Circuit reversed, holding that there was no basis in law for the lower court's "singular entity" theory. The court noted that under such an interpretation of "addition," the pollution of one navigable water would necessitate all other navigable waters to passively suffer the same fate:

> We can take judicial notice that the Pemigewasset River was for years one of the most polluted rivers in New England, the repository for raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel the paint off buildings located on its banks. Yet, under the district court's theory, even if such conditions still prevailed, a proposal to withdraw



> water from the Pemigewasset to discharge it into Loon Pond would be analogous to moving water from the top to the bottom of a single pond; it would not constitute an "addition" of pollutants "from an external source" because both the East Branch and Loon Pond are part of the "singular" waters of the United States. n30 The district court apparently would reach the same conclusion regardless of how polluted the Pemigewasset was or how pristine Loon Pond was. We do not believe Congress intended such an irrational result.

*Id.* at 1297.

Similarly, in *Catskills*, the Second Circuit noted that if the discharged water and the receiving water are wholly unrelated, it is logical to conclude that the discharge of the former into the latter "adds" to the receiving water:

> [W]ater is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sediment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.

*Catskills*, 273 F.2d at 492. In other words, if the two bodies of water are otherwise unrelated, and the hand of man is

responsible for one reaching the other, an "addition" has occurred.

It makes far more sense – and is far more consistent with the letter and the spirit of the CWA – to ask whether the discharged pollutant would reach the receiving water "but for" the point source. This, of course, was the reasoning of the Eleventh Circuit herein, as well as of the First and Second Circuits in *Catskills* and *DuBois*. The fact that the pollutant is contained within water simply makes that determination a hydrological one.

"Hydrological connectivity" alone is not sufficient, however. As was noted by the First Circuit in *DuBois*, two bodies of water may be connected, but fundamental natural laws (such as the fact that water does not flow uphill) dictate whether water from one would ever find its way into the other:

> the Forest Service's "hydrological connectedness" proposal ignores a fundamental fact about water: the direction of flow. It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the Pond flows down and eventually empties into the River. *But water from the East Branch certainly does not flow uphill into Loon Pond,* carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream.

*DuBois*, 102 F.3d at 1298 (emphasis added). In other words, the determination of what constitutes "the outside world" begs for a test akin to the test of "reasonableness" in torts – not a hard and fast rule, but one that reflects the



real world. Indeed, courts have repeatedly interpreted the CWA in a fact-specific manner since CWA was passed.

### B. The Court Should Focus on the Presence of a Pollutant Rather than On the Medium In Which It Is Transported.

EPA focuses on the medium in which the pollutant is traveling – water – thereby overlooking the crucial fact that a pollutant, not present in the receiving water, is being discharged into that water. It is as though a water of the United States is the Invisibility Cloak in *Harry Potter* – as long as the pollutant is safely ensconced therein, it is invisible to the CWA. No liability attaches, no NPDES permit is required, and the discharger can discharge to its heart's content.

The fact that it is water being discharged may be relevant from the standpoint of federal deference to state water management; however, it should be wholly irrelevant for purposes of determining whether an "addition" has occurred. If the discharged water is unrelated to the receiving water, then ordinary language forces the conclusion that the joining of the two is an "addition," whether the discharger has "used" the water or not.

As is amply demonstrated by *Amici*'s litigation against the surface-water discharge of coalbed methane wastewater, not all industrial users "use" the water they later discharge. Coalbed methane producers, for example, discharge highly mineralized groundwater into surface waters as an industrial waste, without ever "using" the water in any way. *See Northern Plains Resource Council*, 325 F.3d 1155. The CWA neither requires a discharger to have used the water it is discharging nor to have added

the pollutant contained therein. Instead, the statute looks at whether there is a pollutant, whether it is being "added" to the waters into which it is being discharged, whether those waters are waters of the United States and therefore within federal jurisdiction, and whether the pollutant is discharged from a point source. The fact that the discharge is primarily water should be legally irrelevant. Any interpretation of "addition" must protect these basic textual truths.

### C. If A Levee Is A Dam, *Gorsuch* Controls.

"Additions would probably not be so complicated were it not for the "dam cases." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). *Gorsuch* holds that water moving through a dam is not "added" to the water below the dam, while *Consumers Power* holds that materials already present in the water above the dam do not become pollutants simply because they are transformed by the dam. The plaintiffs' arguments in these cases made superficial sense: here is a body of water, here we've added a dam, and now the body of water has pollutants in it because of the dam. Such a scenario appears to fit all the criteria of § 1342.

Based largely upon *Chevron*-style deference to the EPA, which argued that dams do not require NPDES permits, both Courts of Appeals came to the same conclusion: the water going in and the water coming out are the same, therefore there is no "addition." *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Unless this Court chooses to overrule them, the dam cases establish an important parameter of the "addition" test: If



the water merely passes through a point source, then nothing is "added" and no NPDES permit is required.

The levees and the pump station herein are closely analogous to a dam. *See, e.g.*, http://www.sfwmd.gov/gover/s_9final/presskit/p_kit.html (photographs of the S-9 pumping station and adjoining waterways). As found by the lower court:

> Both the C-11 Basin and the WCA-3A were part of the historical Everglades. Before construction of the C-11 Canal, the Levees, and the S-9 pump station, the surface and ground waters on both side of the Levees intermingled. The natural flow of the waters at that time was a southerly moving sheet of water. *But for man's intervention, these waters would essentially be a single body of navigable water.*

*Miccosukee*, 280 F.3d at 1369 n. 8 (emphasis added). To say that but for man's intervention two bodies of water would be one is to describe a dam. A dam creates a reservoir, and releases water downstream through a spillway. The water quality of the reservoir may be completely different than the water quality of the downstream river. The state may even develop separate TMDLs (total daily maximum loads) for the different stretches of river. Nonetheless, under the established law of the dam cases, the dams do not "add" pollutants to the river.

Thus, if the levees herein are essentially dams, and the water in both the C-11 Basin and the WCA-3 are essentially the same, *Gorsuch* holds that no addition can occur. Importantly, it would be unnecessary to make any holding regarding conveyances of water between two distinct water bodies.

On the other hand, as Respondents and other *Amici* urge, if the S-9 pump station is not a dam but rather a means to convey water from one distinct water body to another, then an "addition" has occurred. The Circuit Court's holding that the water bodies herein are distinct emphasized the fact-intensive nature of such a determination. As such, of course, it is a determination best left to the lower courts.[6]

Finally, it is important for this Court to keep in mind that if the lower court's decision is upheld, it does not mean the water management agency will be prevented from accomplishing its task. This point was amply made by the United States in its brief opposing certiorari. *See, e.g.*, Brief Opposing the Petition at 17 ("it appears at least questionable that the NPDES permit would subject petitioner to any significant environmental obligations beyond those that petitioner already faces under other existing laws"); 18 ("[the NPDES permitting] process appears unlikely to result in any change in the operation of the pumping station or to subject petitioner to additional

[6] In its brief opposing the Petition for Certiorari, the United States noted that:

> Although the lower court's characterization of the water control facilities at issue as creating distinct bodies of water for CWA purposes may be incorrect, the correction of that error – which would turn on the characteristics of a number of special statutes, the historic and current hydrology of the Everglades, and characteristics of the water control facilities themselves – would involve a fact-intensive examination of record and non-record material in light of the interlocking framework of federal and state laws that govern water resources in the Everglades region.

Brief Opposing the Petition for the U.S. as *Amicus Curiae*, at 14.



pollution control requirements beyond those currently required or planned under federal or state law."). Congress has determined that the NPDES permit system is the cornerstone of the CWA, and this Court should not disturb that law or its common-sense administration.

## CONCLUSION

EPA's contention that a pollutant can be added but once to navigable waters is artificial, unworkable, and undermines the explicit goal of the CWA to maintain as well as restore water quality. *Amici* respectfully urge this Court to recognize the peril created by such a situation. If the waterbodies herein are distinct, a pollutant can be "added" even though both waterbodies are navigable waters of the United States. If they are a single waterbody, then the dam cases control and no "addition" can occur when the discharged water and the receiving water are one and the same. Alternatively, although not addressed by *Amici*, section 101(g) may require substantial deference be paid to state water managers.

For the foregoing reasons, *Amici* respectfully urge the Court to affirm the lower court's decision regarding the "addition" of a pollutant.

Respectfully submitted,

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In The
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICI CURIAE* NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, AMERICAN RIVERS, NATIONAL AUDUBON SOCIETY, NATIONAL PARKS CONSERVATION ASSOCIATION AND WORLD WILDLIFE FUND IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CONTENTS | i |
| STATEMENT OF INTEREST | 1 |
| STATEMENT OF THE CASE | 1 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 4 |
| I. ON THE FACE OF §§ 301(a) AND 402(a), AS ELUCIDATED BY USAGE OF THE TERM "DISCHARGE" IN § 401, S-9's PUMPING CONSTITUTES THE "DISCHARGE OF ANY POLLUTANT." | 4 |
| A. S-9's Pumping Constitutes a Discharge... | 4 |
| (1) The Statutory Term "Discharge" Must Be Given Meaning, and That Meaning Should Be Consistent With Usage Elsewhere in the Act | 5 |
| (2) Both the Plain Meaning of the Term, and Usage of the Same Term in § 401(a), Confirm That S-9's Pumping Constitutes a "Discharge." | 6 |
| B. The Water Pumped Through S-9 Contains "Pollutants." | 7 |
| C. Discharge of Water Containing Pollutants Constitutes the "Discharge of Any Pollutant." | 8 |
| II. S-9's PUMPING FITS WITHIN THE § 502(12) DEFINITION OF "DISCHARGE OF A POLLUTANT." | 8 |

TABLE OF CONTENTS – Continued

Page

A. S-9's Discharge Constitutes the "Addition" of Pollutants to United States Waters ..... 9

(1) Circuit Precedent Unanimously Holds That Diversions Between Waterbodies Constitute "Additions." ..... 9

(2) By Regulating Discharges of "Dredged Material" and "Dredged Spoil," the Act Confirms That Discharges Need Not Come From an Outside Source ..... 11

B. S-9 Is a "Point Source." ..... 16

C. Pollutants Are Added to WCA3 "From" S-9 ..... 16

III. SECTION 304(f)(2)(F) OFFERS NO BASIS FOR OVERRIDING THE ACT'S SUBSTANTIVE PROVISIONS CONCERNING DISCHARGE OF POLLUTANTS ..... 17

IV. THE RULES OF STATUTORY INTERPRETATION FAVOR THE APPLICABILITY OF THE ACT'S POINT SOURCE PROVISIONS TO S-9 ..... 19

A. Applicability of Point Source Requirements to S-9 Is Well Within Congress' Commerce Clause Power Over the Concededly Navigable Waters at Issue Here, and Thus Does Not Implicate Federalism-Driven Clear Statement Principles ..... 19

B. Exempting S-9's Pumping of Phosphorus-Laden Stormwater From Point Source Requirements Would Produce Absurd Results ..... 27



TABLE OF CONTENTS – Continued

Page

C. The Rule of Lenity Offers No Basis for Narrowing the Reach of the Act's Point Source Provisions ..... 29

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

Page

CASES

*Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003).....7, 9, 10

*Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976).....10

*Arkansas v. Oklahoma*, 503 U.S. 91 (1992).....29

*Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).....13, 14

*Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 999 (2002).....14

*Caminetti v. United States*, 242 U.S. 470 (1917).....22

*Catskill Mountains Chapter v. City of New York*, 273 F.3d 481 (2d Cir. 2001).....9

*Chao v. Mallard Bay Drilling*, 534 U.S. 235 (2002).....24

*Desert Palace v. Costa*, 123 S. Ct. 2148 (2003).....6

*Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996).....9

*Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).....27

*Milwaukee v. Illinois*, 451 U.S. 304 (1981).....26, 28, 29

*Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617 (8th Cir. 1979).....17, 25

*National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).....15

*National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).....10



## TABLE OF AUTHORITIES – Continued

Page

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).....10

*New York v. FERC*, 535 U.S. 1 (2002).....23

*Norfolk & Western Rwy. Co. v. Ayers*, 538 U.S. 135, 123 S. Ct. 1210 (2003).....24

*PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994).....2, 6, 7, 24

*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).....3, 5, 19, 20, 22, 23

*Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975).....26

*US Airways v. Barnett*, 535 U.S. 391 (2002).....24

*United States v. Brace*, 41 F.3d 117 (3d Cir. 1994).....14

*United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000).....14

*United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).....20, 21, 22

*United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985).....14

*United States v. M.C.C. of Florida*, 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *discharge analysis reaffirmed on remand*, 848 F.2d 1133 (11th Cir. 1988).....14

*United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).....27

TABLE OF AUTHORITIES – Continued

Page

*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ..... 20

*United States v. Thompson/Center Arms Company*, 504 U.S. 505 (1992) ..... 30

STATUTES

Clean Water Act § 101, 33 U.S.C. § 1251 ..... 2, 23, 24, 25, 29

Clean Water Act § 301, 33 U.S.C. § 1311 ..... *passim*

Clean Water Act § 303, 33 U.S.C. § 1313 ..... 26

Clean Water Act § 304, 33 U.S.C. § 1314 ..... 17, 18, 26

Clean Water Act § 306, 33 U.S.C. § 1316 ..... 26

Clean Water Act § 307, 33 U.S.C. § 1317 ..... 12

Clean Water Act § 401, 33 U.S.C. § 1341 ..... *passim*

Clean Water Act § 402, 33 U.S.C. § 1342 ..... *passim*

Clean Water Act § 404, 33 U.S.C. § 1344 ..... *passim*

Clean Water Act § 502, 33 U.S.C. § 1362 ..... *passim*

REGULATIONS

33 C.F.R. § 323.2 ..... 11, 17

40 C.F.R. § 122.44 ..... 26

40 C.F.R. § 123.30 ..... 26

40 C.F.R. § 125.3 ..... 26

40 C.F.R. § 232.2 ..... 11



TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

117 Cong. Rec. 38798-38854 (Nov. 2, 1971) ..... 12, 25

118 Cong. Rec. 10662 (March 28, 1972) ..... 25

123 Cong. Rec. 26712 (August 4, 1977) ..... 13

123 Cong. Rec. 26767 (August 4, 1977) ..... 13

H.R. Rep. No. 911, 92d Cong., 2d Sess. (1972) ..... 25

S. Rep. 370, 95th Cong., 1st Sess. (1977) ..... 13

S. Rep. 414, 92d Cong., 1st Sess. (1971) ..... 25

COURT RULES

S. Ct. R. 37.3(a) and 37.6 ..... 1

## STATEMENT OF INTEREST

National Wildlife Federation, Natural Resources Defense Council, Sierra Club, American Rivers, National Audubon Society, National Parks Conservation Association and World Wildlife Fund all have a long history of involvement in, and expertise concerning, the protection of our Nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, they have pursued these interests repeatedly during the three decades since enactment of the seminal 1972 amendments that gave the Act its current structure. All of these organizations have members who use and rely on a wide array of waters throughout our Nation for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply.[1]

## STATEMENT OF THE CASE

At issue is whether the core protections of the Clean Water Act apply to South Florida Water Management District's practice of pumping huge quantities of pollutant-laden stormwater uphill from a collection canal in a developed urban and suburban area, into a natural wetland area in the Everglades. The Act's core objective is to "restore and maintain the chemical, physical, and biological

[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represent that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

integrity of the Nation's waters," § 101(a), and no one denies the substantial adverse effect that the river-sized flow of phosphorus-laden stormwater pumped by petitioner is having on the water quality and ecosystem of the precious Everglades. Instead, the dispute is whether the Act's central safeguard – its point source permitting program – encompasses that pumping.

As we show below, S-9's pumping plainly amounts to the "discharge of any pollutant" triggering point source requirements. Indeed, the highly manipulated activities at issue here bear no resemblance to the surface runoff that the United States cites (at 5 n.1) as the "textbook examples" of *non*point pollution.

Petitioner and the United States seek to avoid point source requirements on the ground that the polluted stormwater canal from which the pumped water is drawn itself constitutes a water covered by the Act – and that moving pollutants from one covered water (the canal) to another (the Everglades) does not constitute a discharge of those pollutants. This argument is textually untenable, as we show below. Moreover, by allowing the unpermitted diversion of polluted water from any covered waterbody to any other, the argument would open the door to major degradation of less polluted waterbodies by more polluted ones. Such an approach cannot be reconciled either with the Act's core objective of restoring and maintaining the integrity of covered waters, or with its provision for water quality standards designed to protect "the specific uses and attributes *of a particular body of water*." *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 717 (1994).



## SUMMARY OF ARGUMENT

Petitioner and the United States pay scant attention to the key statutory phrase defining the applicability of the permit requirement: "discharge of any pollutant." Under the plain meaning of the term, informed by usage of that same term in another Clean Water Act provision (§ 401), S-9's pumping plainly qualifies as a "discharge." Moreover, no one disputed below that the phosphorus in the pumped water is a "pollutant."

S-9's pumping also constitutes the "addition of any pollutant to navigable waters from any point source" within the meaning of the Act's definition of "discharge of a pollutant." It is undisputed that the Everglades waters to which S-9 pumps pollutants are "navigable waters" protected by the Act, and that S-9 constitutes a "point source." Petitioner's and the United States' claim that S-9 does not cause an "addition" of pollutants relies on older appellate precedent, ignoring a recent contrary D.C. Circuit decision. That claim is also irreconcilable with § 404 of the Act, which expressly applies the Act's point source permit program to the "discharge of dredged ... material," a practice described by legislative history as "moving spoil material from *one place in the waterway to another, without* the interjection of *new* pollutants." Appellate decisions have consistently held that relocation of dredged material from one place in United States waters to another constitutes an "addition" triggering point source requirements.

There is no merit in petitioner's attempt to invoke a federalism-driven clear statement test like that applied in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Because the Everglades wetlands at issue here are concededly "navigable waters" entitled to the Act's protection, application of

the point source requirement to control undisputed adverse water quality impacts to those waters constitutes a legitimate exercise of Congress' power to protect the channels of commerce from injurious uses.

Moreover, Congress built a prominent state role into the Act's point source permit program. Permits are issued by Florida, applying the state's own water quality standards and its judgments about technology-based requirements. The modest degree of accountability built into the program is fully appropriate given the legitimate federal interest in protection of the Everglades and other priceless waters.

## ARGUMENT

### I. ON THE FACE OF §§ 301(a) AND 402(a), AS ELUCIDATED BY USAGE OF THE TERM "DISCHARGE" IN § 401, S-9'S PUMPING CONSTITUTES THE "DISCHARGE OF ANY POLLUTANT."

The applicability of § 301(a)'s prohibition, and § 402(a)'s NPDES permitting authority, both hinge on whether there has been a "discharge of any pollutant." As we show below, it is indisputable that (1) S-9's pumping constitutes a "discharge," and (2) the phosphorus contained in the pumped water constitutes a "pollutant." Thus, petitioner's position amounts to the implausible claim that a discharge *containing* a pollutant does not constitute the "discharge *of* any pollutant."

#### A. S-9's Pumping Constitutes a Discharge.

Petitioner and its allies spend virtually all their attention on the *definition* of "discharge of a pollutant,"



§ 502(12), offering various parsings of that definition's terms (such as "addition"). While their analysis of the § 502(12) definition is fundamentally flawed for reasons discussed later in this brief, as an initial matter they err by overlooking the statutory term "discharge" itself.

##### (1) The Statutory Term "Discharge" Must Be Given Meaning, and That Meaning Should Be Consistent With Usage Elsewhere in the Act.

The flaw in petitioner's approach is demonstrated by the same *SWANCC* decision upon which petitioner itself so prominently relies. There the Court construed "navigable waters," which is defined in § 502(7) as "the waters of the United States, including the territorial seas." However, the Court *rejected* an argument that, given the § 502(7) definition, "the use of the word navigable in the statute does *not* have *any* independent significance." 531 U.S. at 172 (quoting Solicitor) (ellipses and internal quotations omitted). The Court concluded: "We *cannot agree* that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' *out of the statute*." *Id.* (emphasis added).

So here. The operative phrase in both § 301(a) and § 402(a) speaks of "discharge." Under *SWANCC*, that word cannot be read "out of the statute" simply because it is statutorily defined. On the contrary, "discharge" must be given meaning.

Moreover, that meaning should comport with usage elsewhere in the Act. Significantly, § 401(a) requires a state certification for any activity "which may result in any *discharge* into the navigable waters." (Emphasis added). Under

this Court's precedent, the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *See, e.g., Desert Palace v. Costa*, 123 S. Ct. 2148, 2155 (2003) (citations and internal quotations omitted). As shown below, petitioner's interpretation would give the term "discharge" in §§ 301(a) and 402(a) a meaning dramatically *different* from the one it has in § 401(a).

### (2) Both the Plain Meaning of the Term, and Usage of the Same Term in § 401(a), Confirm That S-9's Pumping Constitutes a "Discharge."

The plain meaning of "discharge," and usage of that same term in § 401(a), lead inescapably to the conclusion that S-9's pumping constitutes a "discharge."

**Plain meaning.** Though indicating that "[d]ictionary definitions provide guidance to the meaning of the statute," Pet. Br. 26, petitioner never applies such a definition to the statutory term "discharge." However, Justice Scalia did so in *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). As noted in the *PUD* majority opinion, it was undisputed that the passage of water through a dam's tailrace constituted a "discharge." *Id.* 711. Justice Scalia dissented on another point, but did not disagree that there was a discharge. To the contrary, he noted that "[t]he term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.' Webster's Ninth New Collegiate Dictionary 360 (1991)." *Id.* 725. The flowing or issuing out and emitting of water from the proposed Elkhorn Dam in *PUD* met that test, even though the water would not originate in the outside world, but rather would flow from the river upstream of the



dam to the river below it. Similarly, the flow of water and pollutants through S-9, from one United States water (C-11) to another (WCA3), meets that definition as well, and is thus a "discharge."

**Section 401(a).** *PUD* addressed Clean Water Act § 401, which requires a state certification for any activity "which may result in any *discharge* into the navigable waters." (Emphasis added.) The Court noted: "There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible *discharges*," including "*the discharge of water at the end of the tailrace* after the water has been used to generate electricity." 511 U.S. at 711 (emphasis added). This conclusion is consistent with lower court precedent finding that flow through dams and other similar facilities constitutes a "discharge" within the meaning of § 401(a). *See, e.g., Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003). Under this approach, S-9's pumping of water and pollutants from C-11 to WCA3 clearly constitutes a discharge. As noted above, the "normal rule of statutory construction" is that the term "discharge" in §§ 301(a) and 402(a) should be construed consistently with the same word in § 401(a) – rather than diametrically opposite as petitioner advocates.

## B. The Water Pumped Through S-9 Contains "Pollutants."

As the Eleventh Circuit noted, "*[n]o party* disputes that . . . the water released by the [S-9] station *contains pollutants*." Pet. App. 4a-5a (emphasis added). In particular, it contains phosphorus, a common component of "industrial, municipal, and agricultural waste." § 502(6) (defining "pollutant").

Petitioner's half-hearted attempt to retract that concession adds nothing to petitioner's erroneous argument concerning "discharge." Specifically, petitioner argues that, once a substance has been discharged into United States waters, it stops being a "pollutant" and becomes "pollution." Pet. Br. 28. However, given that a "discharge" can occur when water passes from one side of a dam to the other, petitioner's argument is untenable. Because such water is *itself* being "discharged," the phosphorus *contained* in such water constitutes "industrial, municipal, and agricultural waste *discharged into water*" under the definition of "pollutant." § 502(6) (emphasis added).

### C. Discharge of Water Containing Pollutants Constitutes the "Discharge of Any Pollutant."

Given that S-9's pumping constitutes a "discharge," and that the discharge contains "pollutants," it is untenable for petitioner to contend that S-9 does not effectuate the "discharge *of* any pollutant." §§ 301(a), 402(a) (emphasis added). Thus, petitioner's attempt to tease that conclusion out of the Act's definition section (specifically, § 502(12), defining "discharge of a pollutant") should be approached with considerable skepticism. As shown below, petitioner's arguments concerning the § 502(12) definition fall short.

## II. S-9'S PUMPING FITS WITHIN THE § 502(12) DEFINITION OF "DISCHARGE OF A POLLUTANT."

The Act defines "discharge of a pollutant" to encompass *inter alia* "any addition of any pollutant to navigable waters from any point source." § 502(12). Petitioner's attempts to draw support from this definition are meritless.



### A. S-9'S Discharge Constitutes the "Addition" of Pollutants to United States Waters.

Petitioner prominently relies on the definition's use of "addition," claiming that the pollutants contained in S-9's pump water were already present in the C-11 canal and thus are not "add[ed]" to navigable waters by S-9. This argument is meritless.

#### (1) Circuit Precedent Unanimously Holds That Diversions Between Waterbodies Constitute "Additions."

Decisions of at least four circuits have recognized that diversions constitute "additions." Beyond the Eleventh Circuit decision under review here, and the First and Second Circuit decisions discussed in petitioner's brief,[2] the D.C. Circuit recently held that an "addition" occurs when water flows through a dam.

In *Alabama Rivers*, the D.C. Circuit addressed whether there was a "discharge" requiring certification under § 401(a). The project at issue – modification of a hydroelectric facility – would produce "an increased flow of water, and particularly of low dissolved oxygen (DO) water." 325 F.3d at 296. In construing § 401(a)'s term "discharge," the court "found the definition of 'discharge of a pollutant' and 'discharge of pollutants' instructive as 'the nearest evidence we have of definitional intent by Congress.'" *Id.* 299 n.12 (citation omitted). That definition includes the term "addition." § 502(12).

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[2] *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996); *Catskill Mountains Chapter v. City of New York*, 273 F.3d 481 (2d Cir. 2001).

Under that standard, the "plain language" of § 401(a)(1) compelled the conclusion that

> Alabama Power's installation and operation of the new turbine generators at its Martin Dam Project is an "activity . . . which may result in any discharge" within the meaning of section 401(a)(1). As discussed above, "the word 'discharge' contemplates the *addition* . . . of a substance or substances" into the navigable waters. Here, the Commission concluded that the replacement turbines would increase the flow of water into the river by approximately 900 cfs. Thus, at the very least, the replacement turbines will release low DO water into the river at an increased rate of 900 cfs. The installation and operation of the replacement turbines is therefore an activity that "may result in any discharge."

*Id.* 299 (emphasis added; citation omitted).

Though heavily relying on a D.C. Circuit decision issued twenty years *earlier*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), neither petitioner nor the United States have seen fit to alert this Court to that same court's far more recent analysis of the statutory term "addition" in *Alabama Rivers*.[3]

[3] Aside from *Gorsuch*, whose reasoning conflicts with the more recent *Alabama Rivers* decision by the same court, petitioner also relies prominently on *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). That decision – which we submit was erroneous – addresses only recirculation of water and pollutants out of and back into a single water body. Moreover, *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976), though it opined (incorrectly) on the term "addition," did so in the context of reviewing effluent regulations defining the proper *terms* of a point source permit – not whether such a permit is required in the first instance.



**(2) By Regulating Discharges of "Dredged Material" and "Dredged Spoil," the Act Confirms That Discharges Need Not Come From an Outside Source.**

The Act's treatment of "dredged material" and "dredged spoil" confirms the error in petitioner's arguments concerning the term "addition." Those statutory provisions likewise refute the United States' extraordinary argument (at 19) that "[o]nce a pollutant is present in one part of 'the waters of the United States,' its simple conveyance to a different part is not a 'discharge of a pollutant' within the meaning of the Act."

**1972 Amendments.** Enacted in 1972, § 301(a) prohibits the "discharge of any pollutant," and § 502(6) defines "pollutant" to include "dredged spoil." Likewise enacted in 1972, § 404(a) authorizes the Secretary of the Army to issue permits for the "discharge of *dredged* or fill material." (Emphasis added.) Contrary to petitioner's and the United States' attempt to dismiss their relevance, these two provisions are highly germane to this case, because they are governed by the *same* statutory definition at issue here – specifically, § 502(12), which defines "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." (Emphasis added.)

The very nature of dredged spoil and dredged material – as confirmed by longstanding EPA and Corps regulations – is that they *originate in United States waters*. 40 C.F.R. § 232.2 (EPA regulation defines "dredged material" as "material that is excavated or dredged *from waters of the United States*") (emphasis added). *Accord*, 33 C.F.R. § 323.2(c) (Corps regulation). Thus, *any* discharge of dredged material inherently involves *moving* material that

originated in United States waters – not introducing material to those waters from an external source.

Indeed, according to the sponsor of the floor amendment that first proposed assigning the Corps permitting authority over dredged material discharge, such discharge involves "moving spoil material from *one place in the waterway to another*, *without* the interjection of *new* pollutants." 117 Cong. Rec. 38854 (Nov. 2, 1971) (emphasis added) (Sen. Ellender). *Accord*, *id.* 38853 ("The disposal of dredged material does *not* involve the introduction of *new* pollutants; it merely *moves* the material from one location to another.") (emphasis added).

**1977 Amendments.** The 1977 Amendments further refute petitioner's contention that an addition – and a discharge – occurs only when material is introduced from outside United States waters. Those amendments enacted conditional exemptions for specified kinds of dredged material discharges, § 404(f)(1), but provided that those same discharges are subject to point source requirements for toxics, § 404(f)(1) (citing CWA § 307, 33 U.S.C. § 1317), and must obtain a point source permit where impacts on United States waters would be significant. § 404(f)(2).

Tellingly, among the discharges that are subject to point source requirements in the above-specified circumstances are several that involve relocation of dredged material within the same waterbody. These include, for example, discharges associated with "plowing" and "the maintenance of drainage ditches." § 404(f)(1)(A) and (C).

Moreover, Congress worded § 404(f)(1)(C) narrowly to encompass only the "maintenance," but not the *construction*, of drainage ditches. Thus, Congress confirmed that ditch construction – which involves relocation of dredged material over short distances – lacks even a *conditional*



exemption from permitting.[4] Congress' treatment of ditch construction further refutes petitioner's claim that a discharge occurs only when material is introduced from outside of United States waters.

Finally, the 1977 Amendments added an exemption for agricultural drainage, but limited it to "*minor* drainage." § 404(f)(1)(A) (emphasis added). The drafters explained that "[t]he exemption for minor drainage does not apply to the drainage of swampland or other wetlands." S. Rep. 370, 95th Cong., 1st Sess. 76 (1977).[5] Congress' intent to regulate discharges associated with agricultural drainage activities – which likewise typically involve relocation of dredged material over short distances – offers yet further evidence against petitioner's claim that relocation of pollutants within United States waters involves no discharge at all.

**Judicial precedent.** A series of appellate decisions extending back two decades has without exception found that a discharge occurs when dredged material is relocated from one place in United States waters to another. Indeed, those decisions have unanimously confirmed that a discharge occurs when dredged material is relocated *within* a single waterbody.

The seminal case of *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983), held:

> *No one* has urged here that the materials must come from an *external source* in order to constitute a discharge necessitating a § 404 permit, nor

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[4] *Accord*, 123 Cong. Rec. 26712 (August 4, 1977) (Senator Muskie).

[5] *Accord*, 123 Cong. Rec. 26767 (August 4, 1977) (Senator Muskie); *id.* (Senator Dole).

> would we expect them to, since § 404 refers to "dredged" or "fill" material. . . . "[D]redged" material is by definition material that comes *from the water itself*. A requirement that all pollutants must come from outside sources would *effectively remove the dredge-and-fill provision from the statute*.

*Id.* 924 n.43 (emphasis added).

Relying on this principle, *Avoyelles* and other appellate decisions have found that relocating dredged or fill material within a single waterbody constitutes an "addition." *See, e.g., Avoyelles*, 715 F.2d at 920-26 (relocation of soil and other material within wetland constituted a discharge); *United States v. M.C.C. of Florida*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *discharge analysis reaffirmed on remand*, 848 F.2d 1133 (11th Cir. 1988) (tugboat propellers added dredged material by stirring up sediment that then settled on adjacent seagrass beds);[6] *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (relocation of dredged material from a ditch to the edge of the ditch constituted an "addition"); *United States v. Huebner*, 752 F.2d 1235, 1241-43 (7th Cir. 1985) (§ 404 permit required for use of earthmoving equipment to spread soil around wetlands); *United States v. Brace*, 41 F.3d 117, 127-29 (3d Cir. 1994) (same); *Borden Ranch Partnership v. U.S. Army Corps of*

[6] Petitioner argues unpersuasively that *M.C.C.* is distinguishable because it involved the use of boat propellers to "rip up sediment." Pet. Br. 30 n.4. To the contrary, because the sediment indisputably originated *in United States waters*, *M.C.C.* stands as strong refutation of petitioner's and the United States' argument that a discharge exists only when pollutants are introduced into United States waters from an outside source.



*Engineers*, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 999 (2002) (same).

Even the most restrictive appellate decision on the issue agrees that relocation of dredged material within United States waters – indeed, within a single waterbody – can constitute an addition. In *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the court held that "incidental fallback," which occurs when dredged material is returned "virtually *to the spot* from which it came," *id.* 1403 (emphasis added), does not constitute an "addition." *Id.* 1405. However, the court confirmed that relocation of dredged material to a *different* spot – even within the *same* waterbody – can constitute an "addition" and thus a discharge.

For example, *National Mining* expressly confirmed that it did not intend to question the regulation of "redeposits at some distance from the point of removal." 145 F.3d at 1407 (emphasis added). The amount of relocation the *National Mining* court considered sufficient to trigger § 404 jurisdiction was minimal. *Id.* 1407, 1402 (confirming that the court was not questioning § 404 jurisdiction over "sidecasting," a practice that "involves placing removed soil . . . by the side of an excavated ditch"). Likewise, *National Mining* expressly confirmed that *plowing* – which likewise involves minimal relocation of dredged material – can constitute an "addition." *Id.* 1405.

In short, Congress' express provision for regulation of discharges of "dredged spoil" and "dredged material" stands in strong refutation to petitioner's and the United States' argument that an "addition" occurs only when pollutants are introduced into United States waters from an outside source.

### B. S-9 Is a "Point Source."

As the Eleventh Circuit observed, "*[n]o party* disputes that the S-9 pump station and, in particular, the pipes from which water is released constitute a point source." Pet App. 4a-5a (emphasis added). Indeed, no other conclusion is possible given the Act's broad definition of point source as "*any* discernible, confined and discrete conveyance, including but not limited to [*inter alia*] *any* pipe, ditch, channel, tunnel, [or] conduit." § 502(14) (emphasis added).

### C. Pollutants Are Added to WCA3 "From" S-9.

Noting § 502(12)'s reference to addition of a pollutant "from" a point source, petitioner argues that pollutants are not being added to WCA3 "from" S-9: "The S-9 pump station is not the starting point, source, or origin of any pollutants. Any pollutants are added to the navigable waters of the C-11 Canal from other sources within the surrounding area or already exist in the environment." Pet. Br. 27 (internal quotations omitted). As the United States correctly points out, however, a point source is by express statutory definition a "conveyance," § 502(14), thus "signif[ying] that a point source itself need *not* generate or be the originating source of the pollutant." U.S. Br. 21 (emphasis added). Petitioner does not and could not deny that Congress intended the NPDES point source program to encompass municipal sewage treatment plants and stormwater systems – both of which convey rather than originate pollutants. U.S. Br. 22 n.6 (citing CWA §§ 301(b)(1)(B) and 402(p)).



## III. SECTION 304(f)(2)(F) OFFERS NO BASIS FOR OVERRIDING THE ACT'S SUBSTANTIVE PROVISIONS CONCERNING DISCHARGE OF POLLUTANTS.

Petitioner and the United States rely heavily on § 304(f)(2) in arguing that diversions constitute nonpoint source pollution, rather than the discharge of pollutants. However, § 304(f) on its face is an "information" provision that does not purport to amend the Act's substantive provisions, or to define the terms used therein. Moreover, the word "nonpoint" appears only in § 304(f)(1), *not* in § 304(f)(2) or the prefatory language introducing § 304(f).

Beyond these fundamental objections, petitioner's argument suffers from another fatal flaw. Section 304(f)(2) cannot possibly be construed as a list of exclusively *non*-point source problems, because the listed items include several that plainly involve *point* source discharges. For example, § 304(f)(2)(F) itself references the "the construction of dams, levees, channels, causeways, or flow diversion facilities," which plainly involves point source discharges. *See, e.g., Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 624-27 (8th Cir. 1979) (construction of dams involved "discharge of dredged or fill material" requiring a permit under § 404); 33 C.F.R. § 323.2(f) (Corps' definition of "discharge of fill material" includes several items enumerated in § 304(f)(2)(F) – specifically, "dams," "levees," and "causeways"). Likewise, other subparagraphs of § 304(f)(2) reference "agricultural ... activities" and "mining activities," which under the express terms of the Act involve point source discharges. *See* §§ 502(14) (definition of "point source" includes "any ... concentrated animal feeding operation"); 301(p) (providing for discharge permits for certain mining-related discharges),

402(l)(2) (exempting certain mining-related discharges from § 402 permit requirements, but only where such discharges "are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.").

Finally, in their focus on the purely informational § 304(f)(2), petitioner and the United States have entirely overlooked a different Clean Water Act provision that expressly addresses the relationship between flow changes and the point source *permit* requirement – and does so in a way that cuts diametrically *against* petitioner's and the United States' proffered interpretation. Enacted in 1977, § 404(f) provides that discharge of dredged or fill material associated with various listed activities is *conditionally* exempt from the § 301(a) discharge prohibition and the § 402(a) and 404(a) permit requirements, § 404(f)(1), but cautions:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where *the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall* be required to have a *permit* under this section.

§ 404(f)(2) (emphasis added). This provision expressly recognizes that point source discharges can involve impairment of the flow or circulation of navigable waters, and requires that such discharges *have a point source permit*.



## IV. THE RULES OF STATUTORY INTERPRETATION FAVOR THE APPLICABILITY OF THE ACT'S POINT SOURCE PROVISIONS TO S-9.

Petitioner offers three principles of statutory interpretation that allegedly militate against applicability of point source requirements to S-9. All of these arguments are meritless.

### A. Applicability of Point Source Requirements to S-9 Is Well Within Congress' Commerce Clause Power Over the Concededly Navigable Waters at Issue Here, and Thus Does Not Implicate Federalism-Driven Clear Statement Principles.

Petitioner (at 34-37) seeks to invoke the federalism-driven "clear statement" test discussed in *SWANCC*. The foregoing discussion shows that the Act's point source provisions clearly apply here, and thus would meet that test. However, consideration of the waters, the activities, and the statutory program at issue here confirms the inapplicability of federalism-driven clear statement principles.

**The Waters at Issue.** Petitioner's clear statement argument ignores a fundamental difference between *SWANCC* and this case. There, the dispute was whether certain waters – an "abandoned sand and gravel pit" described by the Court as "*non*navigable, isolated, intrastate waters," 531 U.S. at 166, 174 (emphasis added) – were properly subject to point source requirements. That was the context for *SWANCC*'s observation that, "[w]here an administrative interpretation of a statute invokes the *outer limits* of Congress' power, we expect a clear indication that Congress intended that result." *Id.* 172 (emphasis added).

However, *SWANCC* left undisturbed *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which upheld point source jurisdiction over adjacent wetlands. Explaining *Riverside Bayview*, *SWANCC* noted: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U.S. at 167 (emphasis added). Here, such a nexus plainly exists: no one denies that WCA3 constitutes "navigable waters" under the Act. Accordingly, protection of WCA3's water quality is not at the "outer limits" of the Act's constitutional reach, and there is no need to invoke a clear statement rule. To the contrary, protection of "navigable waters" is a core and legitimate concern of the Act.

Indeed, that principle was recently confirmed by the Fourth Circuit, which held that clear statement principles do not govern the United States' application of Clean Water Act point source requirements to certain wetlands. *United States v. Deaton*, 332 F.3d 698, 704-08 (4th Cir. 2003). Having determined that the wetlands were within Congress' Commerce Clause power, the court concluded that application of point source requirements

> *does not* invade an area of authority reserved to the states. The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers. "Although States have important interests in regulating . . . natural resources within their borders, this authority is *shared with the Federal Government* when the Federal Government exercises one of its enumerated powers. . . . " *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204, 143 L. Ed. 2d 270, 119 S. Ct. 1187 (1999).



*Id.* 707-08 (emphasis added). In short, application of point source requirements to navigable waters "does *not* invoke the outer limits of Congress's power or alter the federal-state framework," and thus "does *not* present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation." *Id.* 708 (emphasis added).

**The Activities at Issue.** While not disputing that the *waters* at issue are well within the Commerce Clause, petitioner erroneously argues that some subset of *activities* affecting those waters – specifically, those involving "water management and allocation" – should be singled out and subjected to federalism-driven clear statement principles. Pet. Br. 35.

First, the circumstances of this case belie the contention that it only addresses "concern[s] of *the States*." *See* Pet. Br. 35 (emphasis added). The *Corps of Engineers* built the facilities at issue here (the S-9 pump, C-11 canal, and the L-33 and L-37 levees) pursuant to *federal* statute; those facilities are governed by planning requirements established by the *Secretary of the Army* pursuant to *federal* statute; and huge sums of *federal* funds are being spent in the process. Pet. App. 3a; U.S. Br. 7-9. These are not tenable circumstances for an argument that point source regulation would intrude into matters of purely state or local interest.

Nor can the applicability of clear statement canons hinge on whether petitioner believes the activity at issue to be "traditional." *See* Pet. Br. 35. Aside from the obvious implausibility of positing a "tradition" of modern technologies (in this case, huge mechanized pumps), our environmental statutes would be eviscerated if "traditional" activities were insulated from regulation. After all, piping

untreated sewage and industrial effluent into rivers was "traditional" before passage of the Act, but petitioner does not argue that federalism concerns are implicated by regulating those practices.

Finally, it is crucial to remember that the waters at issue here – unlike *SWANCC*'s abandoned sand and gravel pit – are undisputedly a legitimate object of federal protection. The notion that some activities injurious to those waters should be singled out for a federalism-driven clear statement rule is meritless.

Thus in *Deaton*, the Fourth Circuit noted *SWANCC*'s observation that "Congress enacted the Clean Water Act under 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made,'" 332 F.3d at 706 (quoting *SWANCC*, 531 U.S. at 172), and found that "[t]he power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce." This is significant, because "Congress's power over the channels of interstate commerce, unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature." *Id.* In particular, "the authority of Congress to keep the channels of interstate commerce free from *immoral and injurious uses* has been frequently sustained." *Id.* (emphasis added) (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

Applying that principle to the Clean Water Act, the Fourth Circuit found a federalism-driven clear statement rule unwarranted. In particular, "Gongress's authority over the channels of commerce is . . . broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters *for injurious purposes*." *Id.*



707 (emphasis added). The injurious purposes addressed by the Act encompass "degrad[ation of] the *quality* of the navigable waters." *Id.* (emphasis added).

It is undisputed that the activity at issue here – pumping phosphorus-laden water into navigable water that serves as a natural conservation area – is injurious to the Act's core water quality goals. Pet. Br. 13 ("Urban and agricultural development has introduced pollutants into the ecosystem at rates that cannot be assimilated. The resulting imbalance of the ecosystem is manifest in declined faunal populations and an increase in invasive flora."). Thus, application of point source requirements to that activity does not "invoke[] the outer limits" of Congress' power, *see SWANCC*, 531 U.S. at 172, and federalism-driven clear statement principles do not apply.

Indeed, invocation of federalism principles here would reduce them to a caricature. Surely the applicability of constitutionally driven clear statement canons cannot turn on such details as whether phosphorus is piped into WCA3 from other United States waters or from a source outside of those waters. *See* Pet. Br. 31-32. In either case, waters of the United States – in whose protection there is a legitimate federal interest – are degraded.

**The Program at Issue.** Petitioner's federalism argument relies heavily on CWA § 101(b)'s "policy" of preserving state prerogatives. As initial matter, petitioner errs in suggesting that a *policy* can shunt aside the Act's *substantive* point source provisions. *See, e.g., New York v. FERC*, 535 U.S. 1, 22 (2002) (federalism savings clause in Federal Power Act is "a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly

expressed purpose") (citation and internal quotations omitted).[7]

Moreover, if the Act's policies are to guide interpretation, petitioner fails to explain why the Act's central objective to restore and maintain the integrity of United States waters (§ 101(a)) should not carry the day. *See, e.g., Chao v. Mallard Bay Drilling*, 534 U.S. 235, 245 n.9 (2002) (rejecting interpretation that would narrow a regulatory statute's protective reach: "Such large gaps in the regulation of occupational health and safety would be plainly inconsistent with the purpose of the OSH Act."); *US Airways v. Barnett*, 535 U.S. 391, 397 (2002) (rejecting reading under which statutory provision "could not accomplish its intended objective"); *Norfolk & Western Rwy. Co. v. Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 1225, 1228 (2003) (rejecting reading "inconsistent with the Act's overall recovery facilitating thrust" in favor of one that "accords with the [Act]'s overarching purpose").

But even if the Act's federalism policy were accorded substantive effect, application of point source permitting requirements is fully consistent with it. In multiple ways, Congress built a prominent state role into the Act's point source program.

First, Congress expressly provided that states can assume authority to implement the NPDES program, § 402(b) and (c) – as indeed Florida and 44 other states

[7] Likewise, the § 101(g) provision addressing allocation of "quantities" of water is expressly presented as a "policy" – and in any event does not control this case, which involves application of NPDES requirements to protect water *quality*. *See PUD*, 511 U.S. at 720-721.



have done.[8] The authors of the 1972 Act stressed that "permits granted by States under section 402 are *not* Federal permits – but *State* permits." H.R. Rep. No. 911, 92d Cong., 2d Sess. 127 (1972) (emphasis added).

Congress' decision to allow delegations of § 402 authority to states is no mere incidental feature of the 1972 Act, but is integral to Congress's intent. Indeed, § 101(b) – the very provision relied on by petitioner – confirms "the policy of Congress that *the States* . . . implement the permit programs under sections 1342 and 1344 [§§ 402 and 404]." (Emphasis added.)

Significantly, when the 1972 Amendments were enacted, the Corps was beginning to implement an expanded *federal* permitting program under the 1899 Refuse Act. The legislative history expresses Congress' intent that the federal-state balance be restored by allowing *states* to administer the Act's discharge permitting program. *See, e.g.*, 1972 House Rep. at 125 (criticizing the Refuse Act's "total usurpation of enforcement of water quality control by the Federal Government" as "inconsistent with the Federal-State partnership that is necessary if we are ever to have clean and safe waters"; instead, "[t]he role of the States must be clearly recognized"). *See also* S. Rep. 414, 92d Cong., 1st Sess. 70-72 (1971); 117 Cong. Rec. 38798 (Nov. 2, 1971) (Sen. Muskie); *id.* 38808 (Sen. Montoya); 118 Cong. Rec. 10662 (March 28, 1972) (Cong. Roe).

Not only are states permit *issuers*, they also serve a key role in establishing the *content* of permits – both

[8] *See* http://cfpub.epa.gov/npdes/statestats.cfm. Section 404 likewise allows delegation of dredge-and-fill permitting authority to states. § 404(g) and (l). *See Minnehaha*, 597 F.2d at 627.

water-quality based and technology-based. First, in contrast to the *federal* air quality standards mandated two years previously by the 1970 Clean Air Act, *see Train v. Natural Resources Defense Council*, 421 U.S. 60, 64-65 (1975), the authors of the 1972 Water Act opted for *state* water quality standards. § 303(a)-(c). To meet these state standards, Congress provided for *state* pollution caps ("total maximum daily loads"). § 303(d).

As for technology-based requirements, the Act does provide for national standards – but has built-in flexibility in the form of feasibility tests. *See, e.g.*, §§ 301(b), 304(b), 306(a)(1). Moreover, for categories like diversions, for which national standards have not been promulgated, technology-based requirements are set on a *case-by-case basis* by the permit writer – which, in Florida and the other 44 delegated states, is the *state*. *See* 40 C.F.R. §§ 122.44(a)(1), 125.3(c)(2); *Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981) (where "EPA ha[d] not promulgated regulations mandating specific control guidelines [for sewer overflows] because of a recognition that the problem is '*site specific*,'" Court noted that "[d]ecision is made on a *case-by-case* basis, through the *permit* procedure.") (emphasis added).

Thus, *state agencies* issue *state* permits, applying *state* judgments about technology-based requirements and implementing *state* water quality standards and *state* TMDLs. Moreover, *state* courts review these permits. 40 C.F.R. § 123.30. Given the pervasiveness with which Congress designed a state role into the very core of the point source program, there is no valid basis for using federalism principles to shunt that program aside.

In short, the present case is not appropriate for federalism-driven clear statement rules, instead presenting a



normal statutory interpretation issue. *See, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 151 n.4 (2001) (rejecting suggestion that "the resolution of this case depends on one's view of federalism;" instead, "we are called upon merely to interpret ERISA"). *Accord, United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 n.7 (2001).

### B. Exempting S-9's Pumping of Phosphorus-Laden Stormwater From Point Source Requirements Would Produce Absurd Results.

Petitioner claims that applying point source requirements to S-9 would produce "absurd" and "disastrous" results. Pet. Br. 37-45. To the contrary, *exempting* S-9 from those requirements would be absurd.

While petitioner, the United States, and other amici spill much ink discussing *other* fact patterns they fear might be swept into the Act's point source requirements, this case is about one facility only: S-9. According to the United States itself, the question whether there has been a discharge "depend[s] on the facts *of the particular case*." U.S. Br. 24 (emphasis added). *This* particular case strongly counsels application of point source requirements – and differs substantially from other hypotheticals posed by petitioner and its allies.

Significantly, this case does not involve the "textbook examples of nonpoint sources" – *i.e.*, "various forms of runoff, which reach waterbodies by *flowing* over or *percolating* through *topographical features*." U.S. Br. 5 n.1 (emphasis added). Nor does it involve a facility like a dam, which passes water along a course it would have followed naturally – *i.e.*, from upstream to downstream. Finally, it

does not involve a practice lacking significant adverse water quality impacts.

To the contrary, at issue here is a highly human-controlled system under which phosphorus-laden runoff is *collected* in human-made *conveyances*, and then *pumped* several feet *uphill* into another waterbody – causing serious *degradation* of water quality. Under these circumstances, it would be absurd *not* to apply the Act's point source requirements, whose very essence is to regulate the "conveyance" of pollutants to protect the integrity of United States waters. §§ 502(14), 101(a). Indeed, "Congress' intent in enacting the [1972] Amendments was clearly to establish an *all-encompassing* program of water pollution regulation," under which *"[e]very* point source discharge is prohibited unless covered by a permit." *Milwaukee*, 451 U.S. at 318 (emphasis in original; footnote omitted).

Because S-9 is already subject to permitting under Florida law, *see* Pet. Br. 17, petitioner cannot credibly argue that applying a permit requirement to S-9 is in itself absurd. Instead, petitioner argues that the specific requirements associated with the NPDES program – especially its technology-based requirements – were intended to apply only to flows that are "continuous and of known quantity," Pet. Br. 39-40, and to the "original sources" of pollutants rather than those who convey them. Pet. Br. 42-43. *See also* U.S. Br. 27. This argument flies in the face of the Act, which expressly confirms applicability of point source requirements to stormwater and combined sewer overflows, § 402(p)-(q) – both of which involve irregular



flows with varying pollutant loads that do not originate with the discharging entity.[9]

Petitioner also claims that NPDES would interfere with other ongoing programs to protect water quality. Pet. Br. 40-42. To the contrary, the NPDES program would foster compliance with water quality standards, *see* p. 26, *supra*, thus serving one of the Act's "central objectives." *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992). The content of the permit would be established by Florida, applying the state's judgments concerning both water-quality-based and technology-based requirements. *See* pp. 24-26, *supra*. The United States itself argues that the NPDES program has "considerable flexibility," that its burdens "may be relatively modest," and that it "may be reconcilable with, and integrated into," other ongoing water quality efforts. U.S. Cert. Opp. 17-18. In short, three decades after passage of the 1972 Act, and two decades after the date by which Congress intended United States waters to be fishable and swimmable, § 101(a)(2), there is nothing "absurd" or "disastrous" about protecting Florida's navigable waters through the sensible accountability and oversight associated with the NPDES program.

### C. The Rule of Lenity Offers No Basis for Narrowing the Reach of the Act's Point Source Provisions.

The rule of lenity cited by petitioner applies only where a statute is *ambiguous* on the issue at hand.

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[9] *See* U.S. Br. 22 n.6; *Milwaukee*, 451 U.S. at 324; http://www.cfpub2.epa.gov/npdes/wetweather.cfm; http://www.cfpub2.epa.gov/npdes/home.cfm?program_id=5.

*United States v. Thompson/Center Arms Company*, 504 U.S. 505, 517-18 (1992). On the issue cited by petitioner's rule-of-lenity discussion – namely, whether pollutants have to "originate from the point source" (Pet. Br. 45) – the Act is not at all ambiguous. *See* U.S. Br. 22 n.6 (discussing the Act's express provisions for permitting of sewage treatment plants and stormwater systems).

## CONCLUSION

The judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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33

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IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF *AMICI* COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION IN SUPPORT OF RESPONDENTS

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31 AP

## QUESTION PRESENTED

Whether the diversion of water containing pollutants through a man-made point source from one distinct body of water to another requires a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, where the diverted water containing the pollutants would not have entered the receiving water but for the diversion.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| INTEREST OF AMICI | 1 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 6 |
| I. ELEVENTH CIRCUIT CORRECTLY DECIDED THAT A DIVERSION OF WATER CONTAINING POLLUTANTS FROM ONE DISTINCT WATER BODY TO ANOTHER REQUIRES AN NPDES PERMIT | 6 |
| A. Dams and water diversions within a single water body are not implicated by the Eleventh Circuit Decision | 8 |
| B. Petitioner and United States have radically different positions on the issue before the Court | 9 |
| II. NPDES PERMIT PROGRAM ENABLES PENNSYLVANIA TO PROTECT SURFACE WATERS FROM INTERBASIN DIVERSIONS CONTAINING POLLUTANTS THAT MAY DESTROY OR IMPAIR DESIGNATED USES AND CAUSE POLLUTION | 11 |
| A. Since 1986 Pennsylvania has applied its NPDES permit program to interbasin diversions | 11 |

TABLE OF CONTENTS—Continued


| | Page |
|---|---|
| B. The Department has adopted a formal policy for permitting surface water diversions to guide its efforts in applying NPDES Permit requirements | 14 |
| C. NPDES Permit Program provides a flexible, efficient and effective means to regulate interbasin surface water diversions | 16 |
| D. Recent amendments to Florida state law highlight need for enforceable NPDES permit to protect the environment | 18 |
| III. THE UNIQUE FACTS OF THIS CASE PROVIDE AN INDEPENDENT BASIS TO AFFIRM THE ELEVENTH CIRCUIT'S DECISION | 20 |
| A. EPA's NPDES regulations specifically address surface runoff that is collected or channeled by man | 22 |
| B. The C-11 (drainage) Canal is a man-made drainage canal that collects and channels runoff from the C-11 Basin | 23 |
| CONCLUSION | 24 |




TABLE OF AUTHORITIES


CASES — Page

*Arkansas v. Oklahoma*, 503 U.S. 91 (1992) ..... 4

*Catskill Mountain Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 489-94 (2nd Cir. 2001) ..... 9

*Committee to Save Mokelumne River v. East Bay Municipal Utility District et al*, (13 F.3d 305) (9th Cir. 1993), *cert denied*, 513 U.S. 873 (1994) ..... 22, 23

*Del-AWARE Unlimited v. DER*, 508 A.2d 348 (Pa. Cmwlth. 1986) ..... 11, 12, 13, 14

*DuBois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1269-99 (1st Cir. 1996) ..... 9

*Environmental Defense Center v. EPA*, 344 F.2d 832 (9th Cir. 2003) ..... 17

*Miccosukee Tribe of Indians et al. v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002) ..... 2, 6, 7, 8, 9

*National Wildlife Federation v. Consumer Power*, 862 F.2d 580 (6th Cir. 1988) ..... 8, 9, 23

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) ..... 8, 9, 12, 13, 23

*Northern Plains Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155 (9th Cir. 2003) ..... 9

*Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) ..... 17

STATUTES AND REGULATIONS

Federal

33 U.S.C. § 1251 *et seq.*, Clean Water Act ..... i

33 U.S.C. § 1311 ..... 6

33 U.S.C. § 1311(a) ..... 22

33 U.S.C. § 1314(f)(2)(F) ..... 13

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 33 U.S.C. § 1342 | 6 |
| 33 U.S.C. § 1362(11) | 18 |
| 33 U.S.C. § 1362(12) | 6 |
| 33 U.S.C. § 1362(12)(A) | 6, 22 |
| 33 U.S.C. § 1362(17) | 18 |
| 40 CFR § 122.2 | 10, 20, 22, 23 |
| 40 CFR § 122.28 | 16 |
| 40 CFR § 122.47 | 18 |
| 40 CFR § 123.25 | 16 |
| State | |
| Pennsylvania | |
| 32 P.S. § 815.101 | 14 |
| 32 P.S. § 820.1 | 14 |
| 25 Pa. Code §§ 92.81-92.83 | 16 |
| 25 Pa. Code §§ 93.3 | 3, 10 |
| 25 Pa. Code § 93.9 | 3, 10 |
| 25 Pa. Code §§ 93.6-93.8 | 3 |
| 25 Pa. Code §§ 93.9a-93.9z | 10 |
| 30 Pa.B. 3122 (June 17, 2000) | 16 |
| 32 Pa.B. 5999 (December 7, 2002) | 17 |
| 32 Pa.B. 6000 (December 7, 2002) | 16 |
| Florida | |
| Fla. Admin. Code § 62.302-400 | 24 |
| Fla. Stat. § 373.4592(3), *as amended* | 19 |
| Fla. Stat. § 373.4592(9)(k) and (l) | 18, 19 |
| Fla. Stat. § 373.4592(10) | 18, 19 |
| Fla. Stat. § 373.4592(10)(b) | 19 |


IN THE

# Supreme Court of the United States

No. 02-626

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner*,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF *AMICI* COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION IN SUPPORT OF RESPONDENTS

## INTEREST OF *AMICI*

The Commonwealth of Pennsylvania, Department of Environmental Protection, (Department or Commonwealth) respectfully submits this brief [1] in support of Respondents Miccosukee Tribe of Indians, *et al.* *Amici* Commonwealth urges that the Court affirm the Eleventh Circuit's decision holding that the Clean Water Act (the "Act") requires an NPDES permit where a "point source" discharges water

[1] This Brief was prepared by the Pennsylvania Office of General Counsel on behalf of the Department, and it is submitted with the written consent of the parties. Rule 37(2) and (6) of the Supreme Court Rules. Sup. Ct. R. 37(2) and (6).

containing pollutants from one distinct body of water to another in circumstances where, as here, the pollutants would not have entered or affected the receiving body of water but for the operation of the point source, even though the point source is not the original source of the pollutants. *See Miccosukee Tribe of Indians et al. v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002). The NPDES permit program provides a flexible, efficient, enforceable and necessary means to protect the water quality and related uses of Pennsylvania's waters from impairment or pollution. A contrary interpretation of the Act will leave largely unregulated the human-induced transfer of lower-quality water, or water with significantly different biological, chemical or physical attributes, into higher-quality receiving waters, and will create a significant gap in the Commonwealth's authority to protect and maintain the quality of its waters under the Act.

In 1986, the Pennsylvania Courts held that Pennsylvania's approved NPDES permitting program was applicable to the interbasin diversion of water containing pollutants from one body of water to another. Since 1986, the Department has routinely applied its NPDES permit program to diversions of such water from one distinct body of water to another and has developed a formal guidance document for use in applying these NPDES permitting requirements that provide needed environmental protection. The regulated community in Pennsylvania has routinely complied with the applicable NPDES requirements relating to such diversions. The Department seeks to maintain its full scope of authority to regulate, through the Act, numerous situations which could potentially have an adverse impact on the quality of a receiving body of water such as: the transfer of salt water into fresh water basins; the conveyance of water infested with invasive species (*e.g.*, zebra mussels) into a body of water that is not; the pumping of warm, sediment-laden lake water into a higher-altitude, high quality trout stream with cold and



clear water; and the man-induced drainage of collected waters containing high levels of polluted runoff, including phosphorus, into separate and sensitive watersheds.

The Department has examined and classified each surface water body within its boundaries to establish its "designated uses" (*e.g.*, aquatic life, water supply, recreation, fish consumption, and special protection). 25 Pa. Code §§ 93.3, 93.9 and 93.9a-93.9z. The Department has promulgated water quality criteria that specify maximum pollutant levels, as well as narrative descriptions of water conditions, necessary for a body of water to achieve the most critical use for which it has been designated. 25 Pa. Code §§ 93.6-93.8. The Department has issued thousands of NPDES permits that contain pollutant limitations designed to protect designated uses and maintain the quality of the specific body of water into which pollutants are discharged.

Given these extensive efforts, the Department has a significant ongoing interest in assuring that its finely-tuned programs developed to assess, protect, and improve the water quality of each surface water body within its borders are not frustrated by an incongruous interpretation of the Act that constrains State authority to control the transfer of pollutants from lower-quality to higher-quality waters through the NPDES permitting process. To allow the wholesale human-induced mixing of waters with significantly different chemical, biological or physical attributes to escape the Act's permit requirements will undermine the Act's comprehensive approach to protecting and improving the Commonwealth's surface waters.

The Department also has a strong interest in maintaining the full strength of the Act's permit requirement so as to ensure a strong "national floor" of water quality controls. These national requirements, supervised by EPA, prevent States from relaxing their own standards and enforcement efforts in an attempt to gain a perceived economic or market

advantage in the siting of industrial, commercial or other facilities at the economic or environmental expense of other States. Moreover, because watersheds do not respect political boundaries, downstream States have a strong interest in protecting their water bodies against the transfer of pollutants originating in upstream States. Under the Act, downstream states have the ability to participate and advocate within NPDES permit processes in matters concerning pollutant discharges proposed in upstream States. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

## SUMMARY OF ARGUMENT

The Eleventh Circuit's decision that an NPDES permit is required for a diversion of water, containing pollutants, from one distinct body of water to another through a point source is consistent not only with the Clean Water Act, but also with longstanding Pennsylvania case law and practice. Pennsylvania case law requires an NPDES permit where a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of water into which it would not have otherwise flowed. That point source is the cause-in-fact of the discharge of pollutants, and, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs triggering the NPDES permit requirement.

The Department has for the past seventeen years applied its NPDES permitting program to diversions of surface water containing pollutants from one body of water to another. The Department requires an NPDES permit and evaluates the adverse impacts of a proposed diversion to provide necessary protection to the water quality and designated uses of Pennsylvania's surface waters.



The analysis for evaluating the applicability of the NPDES permit program to dams and dam-induced water quality changes that Petitioners attempt to use in this case is distinguishable from the case before the Court. Outside of the dam context, various Courts of Appeal have consistently held that an interbasin transfer of water containing pollutants through a point source requires an NPDES permit.

The NPDES permitting program provides a flexible, efficient, enforceable and necessary means to protect the water quality and designated uses of surface waters. Since 1986, Pennsylvania has not experienced any of the litany of problems that Petitioner and its Amici Curiae predict. The NPDES permit program authorizes the use of general permits that can be issued quickly without significant administrative burden, and many of the NPDES permits also authorize the use of Best Management Practices (BMP's) in place of more traditional numeric effluent limitations in appropriate situations. The NPDES permit program also expressly authorizes compliance schedules where a permittee needs additional time to achieve compliance. An NPDES permit provides an effective and enforceable means to protect water quality that is lacking under Florida state law that is subject to change.

An independent basis to affirm the Eleventh Circuit exists under the unique facts of this case. To allow human habitation in a portion of the Everglades within the C-11 Basin, a drainage canal system, levees and a pump drained a portion of the Everglades. The drainage canal system, levees and pump maintain the water levels below historic levels by channeling and collecting runoff and related seepage from adjoining areas where water levels are maintained at higher levels. EPA's NPDES regulations define "discharge of a pollutant" (triggering an NPDES permit requirement) as including "surface runoff collected or channeled by man."

The unique facts of this case fit within this regulatory definition, and an NPDES permit is therefore required under EPA's regulations.

## ARGUMENT

### I. ELEVENTH CIRCUIT CORRECTLY DECIDED THAT A DIVERSION OF WATER CONTAINING POLLUTANTS FROM ONE DISTINCT WATER BODY TO ANOTHER REQUIRES AN NPDES PERMIT.

The Clean Water Act prohibits the discharge of pollutants from a point source without an NPDES permit. 33 U.S.C. §§ 1311, 1342. The term "discharge of a pollutant" is defined by statute as " . . .any addition of any pollutant to navigable waters from any point source." *See* 33 U.S.C. § 1362(12)(A). The Eleventh Circuit correctly applied these requirements and decided that a diversion of water containing pollutants from one distinct water body to another requires an NPDES permit. *Miccosukee Tribe*, 280 F.3d at 1368-1369.

The underlying facts in this case, which are not in dispute, support the Eleventh Circuit's decision. *Miccosukee Tribe*, 28 F.3d at 1366-1367; Petitioner's Brief at pages 5-17; and United States' Brief at pages 6-12. The Petitioner (South Florida Management District or SFWMD) is the local sponsor of the Army Corps of Engineers (Corps) Central and Southern Florida Project (CCSF Project), a vast system of levees, canals, water impoundments and other water control structures. SFWMD operates these water control facilities in southern Florida, which has unique hydrologic characteristics. The dispute in this case arises from SFWMD's operation of water control facilities that are part of the CCSF Project. These facilities channel, collect and transport "excess" or "accumulated" water from the C-11 Basin through the C-11 (drainage) Canal that drains an area that was once part of the Everglades. The "excess" or "accumulated" water is runoff



from the C-11 Basin and seepage from the neighboring WCA-3A area where the water levels are maintained at higher levels. SFWMD discharges the "excess" or "accumulated" water from the C-11 (drainage) Canal by means of the S-9 Pump which discharges over the C-33 and C-37 levees, into WCA-3A. This pumped discharge contains excessive levels of phosphorus, a pollutant, that adversely affects the water quality of WCA-3A. Without the S-9 Pump that discharges water from the C-11 (drainage) Canal, the C-11 Basin could flood within days. Without the S-9 Pump, the runoff in the C-11 (drainage) Canal would not discharge into the WCA-3A.

In the decision below, the Eleventh Circuit found that the parties agreed that the S-9 Pump was a point source, that the pumped discharge contains pollutants (phosphorus) and that the C-11 (drainage) Canal and the WCA-3A are navigable waters under the Clean Water Act. *Miccosukee Tribe*, 280 F.3d at 1367. The parties also agree that the discharge of the pollutants is adversely affecting the WCA-3A. The parties disagree on one legal issue: "whether the pumping of already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source." *Miccosukee Tribe*, 28 F.3d at 1367. (italics in original).

The Eleventh Circuit correctly held that "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs." *Miccosukee Tribe*, 280 F.3d at 1368-1369. (italics in original) Thus, an interbasin diversion of surface water containing pollutants by means of a point source is subject to NPDES permitting.

### A. Dams and water diversions within a single water body are not implicated by the Eleventh Circuit Decision.

Several of the Amici (who support the Petitioner) erroneously assert that the Eleventh Circuit decision in this case affects dams and water diversions within a single water body.[2] The decision of the Eleventh Circuit does not affect dams or the natural flow of water within a single water body. The decision recognized EPA's longstanding position on "dams and dam induced water quality changes" that was given deference in earlier decisions,[3] but it concluded:

> We know of no instance in which the EPA has extended its policy on dams and dam-induced water-quality changes to facilities like the S-9 pump station. The EPA is no party to this case; we can ascertain no EPA position applicable to S-9 to which to give *any* deference, much less Chevron deference.

*Miccosukee Tribe*, 280 F.3d at 1367, n. 4 (italics in original). Thus, the Eleventh Circuit Court of Appeals decision merely refused to extend EPA's policy on dams and dam-induced water quality changes to the S-9 Pump discharge from the C-11 (drainage) Canal. The *Miccosukee Tribe* decision does not affect or implicate EPA's policy concerning dams and dam-induced water quality changes that occur within a single body of water.

There is no basis to extend EPA's dams and dam-induced water quality changes policy in this case. EPA's longstanding dam policy provides that an NPDES permit is not required for dams or dam-induced water quality changes because the changes to water quality are caused by the dam.

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[2] Brief of Amici City of New York *et al* at page 13.

[3] *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumer Power*, 862 F.2d 580 (6th Cir. 1988).



*National Wildlife Federation v. Gorsuch*, 693 F.2d at 165-170, *National Wildlife Federation v. Consumer Power*, 862 F.2d at 585, 587. The inherent nature of dams and impounded water cause the water quality changes and these changes, induced or caused by the dam, do not constitute the "addition of a pollutant" under EPA's policy. EPA's policy concerning dams and dam-induced water quality changes is not applicable here because the changes in water quality in WCA-3A, increased levels of the pollutant phosphorus, are not caused by the C-11 (drainage) Canal. The C-11 (drainage) Canal collects and channels the drainage, but it does not cause the phosphorus as would be the case with dam-induced or caused water quality changes that EPA addressed in its Policy.

Outside the dams and dam-induced water quality changes context, various Courts of Appeals have consistently held that interbasin transfers of water containing pollutants through a point source require an NPDES permit. *Miccosukee Tribe*, 280 F.3d at 1366-69; *Catskill Mountain Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 489-94 (2nd Cir. 2001); *DuBois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1269-99 (1st Cir. 1996); *See also Northern Plains Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155 (9th Cir. 2003) (discharge of unaltered groundwater from coal bed methane operations required NPDES permits). This Court does not have to reach the issue of EPA's policy relating to dams and dam-induced water quality changes to address the issue in this case because this case does not involve a dam or dam-induced water quality changes.

### B. Petitioner and United States have radically different positions on the issue before the Court.

The United States in its Brief supports the Eleventh Circuit rejection of the Petitioner's resurrection of the argument that

"pollutants are added" from a point source only if the point source is the origin of the pollutants. United States' Brief at 21. As the United States correctly states, this argument was rejected more than 20 years ago, and Petitioner now is attempting to resurrect this extreme position. United States' Brief at 21. Under Petitioner's approach, a discharge of a pollutant requiring an NPDES permit occurs only "when the pollutant *originates* from this point source, not when pollutants originating elsewhere are merely passed through." Petitioner's Brief at 26-27 (emphasis added). This extreme position has been rejected by the federal courts for more than 20 years, is opposed by the United States and is inconsistent with EPA's regulation that defines the term "discharge of pollutant" at 40 CFR § 122.2 (". . . term includes surface runoff collected and channeled by man."). This position would also severely handicap efforts to regulate publicly owned treatment works and municipal separate storm sewer systems (MS-4) as the United States correctly noted. *See* United States' Brief at 22, n. 6. This Court should reject this extreme position suggested by Petitioner.

The "unified waters" position of the United States is equally as extreme and objectionable and should also be rejected. Under the United States' view, which it failed to share with the Eleventh Circuit below, there is a single "unified waters of the United States." After a pollutant is discharged into one part of the "unified waters of the United States," the water containing the pollutants can be diverted into any other part of the "unified waters of the United States" without triggering any obligation to secure an NPDES permit. This approach jeopardizes the water quality and protected uses of distinct water bodies[4] and would allow the

[4] In Pennsylvania, protected water uses are applied to streams and stream segments. 25 Pa. Code §§ 93.9, 93.9a-93.9z. The distinct uses of individual streams and stream segments deserve protection that will be lost under the United States' "unified waters of the United States" approach.



diversion and mixing of water with significantly different chemical, biological or physical characteristics without the necessary protection of an NPDES permit to protect water quality and stream uses.

The Eleventh Circuit decision correctly imposes the requirement to obtain an NPDES permit that protects water quality and stream uses where a man-made point source changes the natural flow of a body of water and causes it to discharge into another distinct body of water into which it would not have otherwise flowed.

## II. NPDES PERMIT PROGRAM ENABLES PENNSYLVANIA TO PROTECT SURFACE WATERS FROM INTERBASIN DIVERSIONS CONTAINING POLLUTANTS THAT MAY DESTROY OR IMPAIR DESIGNATED USES AND CAUSE POLLUTION.

### A. Since 1986 Pennsylvania has applied its NPDES permit program to interbasin diversions.

Since 1986, the Department has applied its NPDES permitting program in Pennsylvania to interbasin surface water diversions of water containing pollutants from one body of water to another. In 1986, the Pennsylvania Commonwealth Court held the Department had the duty and authority to require an NPDES permit for a diversion of water from the Delaware River to the East Branch of the Perkiomen Creek and North Branch of the Neshaminy Creek. *DelAWARE Unlimited v. DER*, 508 A.2d 348 (Pa. Cmwlth. 1986). The Department continues to routinely apply its NPDES permitting program to interbasin diversions.

In *Del-AWARE*, a citizens group challenged certain permits issued to a power company and several municipalities authorizing a diversion project that supplied water from the Delaware River to public water systems for use as drinking water and to a nuclear power station for use as noncontact cooling water. The matter was initially adjudicated before the Pennsylvania Environmental Hearing Board (Board). The Board upheld the Department's decision, in part, to issue the permits, how-ever, it remanded the matter to the Department ordering it to require an NPDES permit for the diversion of the water from the Delaware River to the North Branch Neshaminy and East Branch Perkiomen Creek. *Del-AWARE*, 508 A.2d at 359.

The power company appealed this remanded aspect of the Board's decision to the Pennsylvania Commonwealth Court.[5] The Pennsylvania Commonwealth Court upheld the Board on this issue and directed the power company to obtain an NPDES permit for its diversion of water from the Delaware River to the East Branch of Perkiomen Creek. *Del-AWARE*, 508 A.2d at 360. The Pennsylvania Commonwealth Court held that the diversion in that case constituted a point source requiring an NPDES permit. It distinguished *National Wildlife Federation v. Gorsuch*, and concluded that:

> "PECO relies on *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), which held that water released from a particular dam to a stream below was not from a "point source." However, *National Wildlife Federation* is distinguishable because it dealt with water diversion within a single body of water, whereas here water will be diverted from one body of water (the Delaware River) to another (the East Branch). Unlike *National Wildlife Federation*, "addition from a point source occurs [because] the point source itself

[5] The power company's diversion of water from the Delaware River was discharged in the East Branch of the Perkiomen Creek.



> physically introduces a pollutant into the water from the outside world."

*Del-AWARE*, 508 A.2d at 359 *citing National Wildlife Federation v. Gorsuch*, 693 F.2d at 175. In sum, the Pennsylvania Commonwealth Court concluded that a water diversion within a single body of water did not require an NPDES permit whereas water containing pollutants diverted from one body of water to another requires a NPDES permit.

This distinction also forms the basis for the Pennsylvania Commonwealth Court's rejection of the power company's argument that the interbasin diversion was a nonpoint source discharge under 33 U.S.C. § 1314(f)(2)(F).[6] The Pennsylvania Commonwealth Court decided that the power company's interbasin diversion "is not a flow diversion changing the "movement, flow or circulation" of East Branch Perkiomen Creek, as would a dam levee, channel or causeway, but one introducing water from a separate basin into the East Branch Perkiomen Creek through a "discernible, confined and discrete conveyance": a "pipe." *Del-AWARE*, 508 A.2d at 359, n. 39. The Pennsylvania Commonwealth Court limited the scope of Section 1314(f)(2)(F) of the CWA to changes in the movement, flow or circulation of water within a single body of water. Thus, the longstanding decision of the Pennsylvania Commonwealth Court is consistent with the recent decision of the Eleventh Circuit Court of Appeals in this case.

[6] Section 1314(f)(2)(F) provides: "The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including . . . (2) processes, procedures, and methods to control pollution resulting from . . . (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways or flow diversion facilities."

**B. The Department has adopted a formal policy for permitting surface water diversions to guide its efforts in applying NPDES Permit requirements.**

Several Amici supporting the Petitioner labor under the mistaken understanding that no state currently requires an NPDES permit for surface water diversions between two distinct water bodies. Brief of the City of New York et al. at page 6. In Pennsylvania, NPDES permits are routinely required for such surface water diversions. The Department routinely follows the rules announced in the *Del-AWARE* decision as evidenced by the formal Technical Guidance that the Department developed and implements. The document is entitled "Policy for Permitting Surface Water Diversion."[7] The Policy states that it "results from a Pennsylvania Commonwealth Court Decision in *Del-AWARE Unlimited et al v. Department of Environmental Resources et al*, 508 A.2d 348 (1986) . . . ruling that the diversion of water from one body of water to another requires a NPDES permit." Policy at page 2.

In Pennsylvania, water users may, with proper authorization,[8] divert water from one body of water to another for ultimate use for any number of purposes. The Policy

[7] All of the Department's formal Technical Guidances are available at its website at www.dep.state.pa.us at the Department's Public Participation Center web-page, and the Policy for Permitting Surface Water Diversion is a Bureau of Water Quality Technical Guidance and is available at the following link. http://www.dep.state.pa.us/eps/docs/cab200149b1126000/fldr200149e0051190/fldr20026l91459089/doc20026l939520ce/362-2000-003.pdf.

[8] The Department issues various permits to authorize such diversions that are described in the identified Policy. In addition, in roughly two-thirds of the Commonwealth, the Delaware and Susquehanna River Basin Commissions also regulate the diversion of water, 32 P.S. § 815.101 and 32 P.S. § 820.1.



describes how the Department uses NPDES permits to protect the water quality and uses of both the diverted and receiving streams. The Department will not authorize a diversion if the diversion from the diverted water body or the discharge to the receiving water body will cause impairment or destruction of the designated uses of either water body.

The Policy recognizes that an interbasin diversion is different from a typical situation requiring an NPDES permit where the discharger has direct control over the volume of the discharge and the levels of pollutants being discharged. In a diversion, the quality of the water being diverted is affected by a variety of naturally occurring and man-induced conditions that are not under the direct control of the diverter. While the Department evaluates the public benefits associated with a diversion versus the potential environmental impacts, the Department is primarily concerned with insuring that the diversion does not cause a violation of state water quality standards in the receiving waters.

As the Policy describes, Pennsylvania's federally approved water quality standards encompass designated water uses and water quality criteria necessary to protect those uses, as well as special protection or antidegradation requirements. Policy at page 9. To ensure protection of the water quality standards, the Department evaluates the expected water quality impact of a diversion by reviewing the available long-term water quality data for both the diverted and receiving streams. Policy at page 10. In its evaluation of the receiving stream, the Department determines if the discharge will have an adverse impact using appropriate modeling techniques. If there are no anticipated adverse impacts then the discharge can be approved. If there are anticipated adverse impacts to the water quality standards then the Department will establish technology-based effluent limitations or other Best Management Practices (BMP's) to prevent the adverse impacts. Policy at page 11.

The NPDES permit program provides Pennsylvania with the necessary permitting tool to protect the water quality and designated uses of streams that could otherwise be impaired or destroyed from a diversion of water.

### C. NPDES Permit Program provides a flexible, efficient and effective means to regulate interbasin surface water diversions.

The Petitioner and several Amici have mistakenly asserted that the NPDES permitting program is a costly, time-consuming, burdensome and bureaucratic program that will "wreak havoc."[9] These unsupported claims are not accurate and are highly speculative. Pennsylvania's actual experience with its NPDES program, in regulating interbasin transfers between different water bodies and in regulating other categories, is different, and it establishes that the NPDES program provides a flexible, efficient and effective means to protect water quality and stream uses.

Pennsylvania has not experienced any of the litany of problems that Petitioner and others mistakenly predict. In addition, the NPDES permit program contains several key elements that will enable states to provide effective, efficient and ultimately enforceable NPDES permit coverage.

General permits are authorized in the NPDES permit program for categories of discharges that qualify for general permit coverage. 40 C.F.R. §§ 122.28 and 123.25; 25 Pa. Code §§ 92.81-92.83. General permits can be issued relatively quickly with a minimum of paperwork and administrative burden. Pennsylvania has, in fact, used general permits for numerous categories of discharges such as Concentrated Animal Feeding Operations (CAFO) (PAG-12), 30 Pa.B. 3122 (June 17, 2000), Stormwater Associated with Construction Activities (Phase I and II) (PAG-2), 32 Pa.B.

[9] Petitioner's Brief at 4.



6000 (December 7, 2002), and municipal separate storm sewer systems (MS-4)(PAG-13), 32 Pa.B. 5999 (December 7, 2002)[10]. These general permits and others (that EPA has approved) belie Petitioner's argument. Any state which is concerned about administrative burdens could use a general permit to significantly reduce permit review timeframes and administrative burdens in appropriate situations.

In addition, the Department recognizes that appropriate Best Management Practices (BMPs) may be used in appropriate circumstances as effluent limitations in NPDES permits in place of numerical effluent limitations in both individual and general permits. BMPs provide a flexible means to regulate discharges subject to the NPDES permitting requirements. The Department, in fact, used BMPs in the general permits listed above as effluent limitations in a flexible and efficient manner. EPA has authorized the use of BMPs in NPDES permits. *See, Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) (5 BMP's allowed in NPDES permit for placer mining). Thus, states implementing an NPDES permitting program have the flexibility to develop a general permit for diversions employing BMP's in appropriate circumstances. Such an approach would eliminate the litany of problems that have been predicted.

A final indication of the flexibility afforded by the NPDES permitting program is contained in the statutory definition of "effluent limitation" which provides that:

> "(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical,

[10] Pennsylvania's PAG-13 for MS-4 is consistent with the Ninth Circuit's decision in *Environmental Defense Center v. EPA*, 344 F.2d 832 (9th Cir. 2003) in which the Ninth Circuit remanded EPA's MS-4 general permit option to EPA to address several deficiencies in EPA's MS-4 general permit.

> physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, *including schedules of compliance*."

33 U.S.C. § 1362(11) (emphasis added") The statutory definition of "schedule of compliance" authorizes a schedule of remedial measures leading to future compliance. 33 U.S.C. § 1362(17). *See* also 40 CFR § 122.47. Thus, the NPDES permit program expressly authorizes flexible schedules of compliance containing a schedule of remedial measures that lead to future compliance with the effluent limitations in NPDES permits. Such flexibility is available in situations where additional time is needed to achieve compliance, such as restoring the water quality of the Everglades.

Thus, the NPDES permit program provides a flexible, efficient and effective means to permit various categories of discharges.

### D. Recent amendments to Florida state law highlight need for enforceable NPDES permit to protect the environment.

Pennsylvania's experience in requiring an NPDES permit for diversions illustrates the meaningful environmental protection provided by the NPDES permit program. To be effective, the means to insure environmental protection need to be enforceable.

Petitioner attempts to minimize the significant and critical importance of a NPDES permit in protecting the environment by asserting the S-9 Pump discharges are already permitted under the Florida Everglades Forever Act, Fla. Stat. § 373.4592(9)(k) and (l) and (10), and that the state permit for the S-9 Pump requires development of strategies to ensure that the facility meets all state water quality standards, including those for phosphorus, by the end of 2006. Petitioner's Brief at page 17. While this statement reflects



Florida state law prior to May 20, 2003, the statement does not recognize that the Florida Legislature enacted two statutory amendments to the Everglades Forever Act (the first amendment became effective on May 20, 2003 and the second became effective on June 10, 2003)[11] that have the effect of extending the June 10, 2006 compliance deadline in the state permit by a decade. The June 10, 2003 amendment to Section 373.4592(10) deleted the following requirement: "By December 31, 2003, the district shall submit to the department a permit modification to incorporate proposed changes to the Everglades Construction Project and the permits issued pursuant to subsection (9). These changes shall be designed to achieve compliance with the phosphorus criterion and the other state water quality standards by December 31, 2006." Fla. Stat. § 373.4592 (10)(b). The statutory deadline for compliance is now in 2016. Without an enforceable NPDES permit requirement, there is no enforceable legal mechanism to assure that discharges from the S-9 Pump will ever meet the state water quality standards that are necessary to protect the Everglades. The state water quality permit for discharges from the S-9 Pump is subject to change, as recent statutory amendments confirm, and it provides no real enforceable means to assure timely compliance with state water quality standards. In contrast, in Pennsylvania there would be an enforceable NPDES permit in place to provide for meaningful environmental protection of state water quality standards.

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[11] *See*, Fla. Stat. § 373.4592(9)(k) and (l) and (10), as amended. In particular, the amendments created a two-phase long-term plan. The initial phase of the long-term plan is for an initial 13-year phase (2003-2016) and a second ten-year phase. The 2016 deadline for the initial phase is ten years longer than the original language. *See* Fla. Stat. § 373.4592(3), *as amended*, creating the Everglades Long Term Plan. The deadline in Section 373.4592(10) authorizing Long-Term Compliance permits is now limited to "Pre-2006 Projects and Strategies of the Long-Term Plan."

## III. THE UNIQUE FACTS OF THIS CASE PROVIDE AN INDEPENDENT BASIS TO AFFIRM THE ELEVENTH CIRCUIT'S DECISION.

The Commonwealth of Pennsylvania supports the analysis adopted by the Eleventh Circuit in this case because it is consistent with longstanding Pennsylvania state case law as well as the Clean Water Act. The Eleventh Circuit did not, however, have to decide the case solely on the basis that it did because the unique facts of this case provide an independent basis to impose an NPDES permit requirement on the S-9 Pump discharge from the C-11 (drainage) Canal. The facts, as set forth by Petitioner and others, establish that the C-11 (drainage) Canal collects and channels runoff from the C-11 Basin within the meaning of EPA's regulations defining "discharge of a pollutant" thereby triggering an NPDES permit requirement for the S-9 pumped discharge. The water in the C-11 (drainage) Canal includes runoff from the C-11 Basin that is "collected and channeled by man." 40 CFR § 122.2.

The Petitioner has jurisdiction over and provides comprehensive water management for the regional South Florida ecosystem. That ecosystem is an immense, integrated and unique system of hydrologically connected surface and ground waters extending over 15,000 square miles. The dominant feature of this unique area is the Everglades, a wetlands system that once encompassed southern Florida. To accommodate human habitation, the State of Florida and the United States, through the Army Corps of Engineers, have constructed elaborate projects that have drained portions of the Everglades and altered the natural flow of the water. While water once moved in a slow, unimpeded sheet from Lake Okeechobee through the Everglades to the sea, it is now directed through drainage canals and related facilities away from heavily populated areas in Broward and Dade Counties.



The petitioner is the local sponsor of the Corps' Central and Southern Florida Project (CCSF Project). The CCSF Project was a "comprehensive plan of improvement designed to remove excess water from urban, pasture and farm lands, to conserve water for control of groundwater levels during dry periods, and to prevent overflow of coastal areas by waters from the Everglades."

This case involves several CCSF Project components. The component consisting of the C-11 (drainage) Canal collects and channels "excess" or "accumulated" water from the C-11 Basin and transports this "excess" or "accumulated" water to the water conservation area WCA-3A in the remaining portions of Everglades by means of the S-9 Pump. The C-11 (drainage) Canal collects and channels "excess" or accumulated" water including surface runoff from C-11 Basin.

The Corps initially constructed the C-11 (drainage) Canal to drain the wetlands in the Everglades and allow development of Broward County. Later the Corps built the two north-south levees, L-33 and L-37 that form the western boundary of C-11 Basin. To allow development and human habitation, the C-11 (drainage) Canal drains the water in the C-11 Basin below levels in the undeveloped wetland areas west of the levees in WCA-3A. The S-9 Pump is needed to maintain the water level in the C-11 Basin below that of the undeveloped area. The water in C-11 (drainage) Canal includes surface runoff from the C-11 Basin that is "collected and channeled by man." This runoff from the C-11 Basin contains pollutants (such as phosphorus) originating from agricultural, residential and other land uses. This phosphorus originates from various point and nonpoint sources that drain into the C-11 (drainage) Canal.

### A. EPA's NPDES regulations specifically address surface runoff that is collected or channeled by man.

Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant" into navigable waters from any point source without an NPDES permit. 33 U.S.C. § 1311(a). The term "discharge of a pollutant" is defined by statute as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). EPA has promulgated a regulatory definition of "discharge of any pollutant" at 40 CFR § 122.2 that, *inter alia*, provides several examples of situations that fit within the definition of "discharge of a pollutant" requiring an NPDES permit. One of the examples in Section 122.2 is directly applicable in this case as the definition of "discharge of a pollutant" therein provides in part that:

> . . . This definition includes additions of pollutants into waters of the United States from: *surface runoff which is collected and channeled by man*; . . .

40 CFR §122.2 (emphasis added). The C-11 (drainage) Canal collects and channels runoff from the C-11 Basin[12] that is discharged from the S-9 Pump that is a point source. Thus, this arrangement fits within the express terms of EPA's regulatory definition of "discharge of a pollutant" and requires an NPDES permit.

The Ninth Circuit in *Committee to Save Mokelumne River v. East Bay Municipal Utility District et al*, (13 F.3d 305) (9th Cir. 1993), *cert denied*, 513 U.S. 873 (1994) applied EPA's regulatory definition of "discharge of a pollutant" in a situation involving "surface runoff which is collected or channeled by man." In that case surface runoff from an

[12] The runoff includes associated seepage from adjoining areas in WCA-3A where the water is maintained at higher levels.



abandoned mine site was "collected and channeled" by a utility defendant. This drainage collected in a dam reservoir where from time to time it passed over a spillway into the Mokelumne River. The Ninth Circuit Court distinguished the *Gorsuch* and *Consumer Power Co.* decisions, involving dams and dam-induced pollution, because the source of the pollution in the Mokelumne River was surface runoff that was collected or channeled by defendants from an abandoned mine site. *Committee to Save Mokelumne River*, 13 F.3d at 208-209. The Ninth Circuit applied EPA's regulatory definition at 40 CFR § 122.2 (definition of "discharge of a pollutant") to hold that defendants were subject the NPDES permit requirements for the discharge of the surface runoff from the mine site that it collected and channeled. *Id.*

### B. The C-11 (drainage) Canal is a man-made drainage canal that collects and channels runoff from the C-11 Basin.

The analysis in *Committee to Save Mokelumne River* is applicable in this case. The only difference is the size of the man-made effort to collect and channel surface runoff. The enormous scale of drainage of a 105 square mile portion of the Everglades wetlands within the C-11 Basin by the C-11 (drainage) Canal should not change or cloud the analysis or outcome. The man-made C-11 (drainage) Canal drains a large portion of the Everglades wetlands to allow human habitation. The seepage that is collected and channeled by SFWMD in the C-11 (drainage) Canal is directly related to the runoff and is an integral part of the drainage that is collected. The water level in C-11 Basin is only maintained by draining the runoff and related seepage by means of the C-11 (drainage) Canal and pumping the "excess" water or "accumulated" water from the S-9 Pump to the WCA-3A area.

The man-made C-11 (drainage) Canal is so large and extensive that it is itself a protected Class III surface water for recreation and propagation and maintenance of fish and wildlife. Fla. Admin. Code § 62.302-400. It, however, remains a man-made structure primarily designed to collect and channel runoff and related seepage. As a man-made structure that collects and channels surface runoff, a discharge from the C-11 (drainage) Canal is subject to the express terms of EPA's NPDES regulations as a discharge of a pollutant requiring an NPDES permit. Thus, the S-9 pumped discharge from this large scale C-11 (drainage) Canal is subject to the NPDES permit program under the express terms of EPA's regulations.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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IN THE

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

*v.*

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA and FRIENDS OF THE EVERGLADES, INC.,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MISSOURI, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Cited Authorities | iii |
| Interest of Amici Curiae | 1 |
| Summary of Argument | 3 |
| Argument | 6 |
| I. The Act Requires An NPDES Permit For Water Transfers That Introduce Pollutants That Would Not Have Entered The Receiving Water Body But For The Point Source. | 6 |
| A. The Text of the Act and EPA Regulations Demonstrate That Transfers of Water Through a Point Source Are Subject to the Act's Permit Requirement. | 6 |
| B. The Act's Structural Focus on the Quality of Each Distinct Water Body Refutes the Theory That the Act Treats the "Waters of the United States" As a Unitary Whole. | 9 |
| 1. The establishment of designated uses, water quality criteria, and NPDES permit conditions refutes the United States' theory. | 10 |
| 2. Other measures aimed at water quality standard compliance also dispel the "unified water" theory. | 12 |

*Contents*


| | Page |
|---|---|
| C. Interbasin Point Source Discharges of Pollutants Are Not Adequately Addressed Through Nonpoint Source or Water Allocation Programs. ..... | 14 |
| II. A Permit Requirement For Interbasin Transfers Of Water Involving The Addition Of A Pollutant From A Point Source Enables States To Protect Water Quality. ..... | 18 |
| III. Application Of The Act's Permit Requirement To Interbasin Point Source Transfers Of Water Containing Pollutants Is Not Unduly Burdensome. ..... | 23 |
| Conclusion ..... | 27 |




**TABLE OF CITED AUTHORITIES**


| | Page |
|---|---|
| **CASES** | |
| *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) ..... | 6 |
| *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481 (2d Cir. 2001) ..... | 8, 9, 20, 21 |
| *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984) ..... | 7, 10 |
| *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) ..... | 21 |
| *Del-AWARE Unlimited, Inc. v. Pennsylvania*, 508 A.2d 348 (Pa. Commw. Ct. 1986) ..... | 24 |
| *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) ..... | 8, 19 |
| *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000) ..... | 24 |
| *Miccosukee Tribe of Indians v. South Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002) ..... | 1, 8, 21, 24, 26 |
| *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) ..... | 8 |

*Cited Authorities*


| | Page |
|---|---|
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| *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) | *passim* |
| *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) | 17 |
| *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) | 15 |
| *United States v. Mead Corp.*, 533 U.S. 218 (2001) | 10 |
| *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) | 26 |
| *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) | 26 |
| **FEDERAL STATUTES** | |
| 33 U.S.C. § 1251 | 1, 6 |
| 33 U.S.C. § 1251(a) | 6, 18 |
| 33 U.S.C. § 1251(a)(7) | 16 |




*Cited Authorities*


| | Page |
|---|---|
| 33 U.S.C. § 1251(g) | 17 |
| 33 U.S.C. § 1311(a) | 6, 14 |
| 33 U.S.C. § 1311(b)(1)(C) | 6, 12 |
| 33 U.S.C. § 1312(a) | 6 |
| 33 U.S.C. § 1313 | 25 |
| 33 U.S.C. § 1313(a) | 6 |
| 33 U.S.C. § 1313(c) | 6 |
| 33 U.S.C. § 1313(c)(2)(A) | 10, 11 |
| 33 U.S.C. § 1313(d)(1)(A) | 13 |
| 33 U.S.C. § 1313(d)(1)(B) | 13 |
| 33 U.S.C. § 1313(d)(1)(C) | 13 |
| 33 U.S.C. § 1313(d)(1)(D) | 13 |
| 33 U.S.C. § 1313(d)(4)(B) | 13 |
| 33 U.S.C. § 1314(c) | 26 |
| 33 U.S.C. § 1314(e) | 26 |
| 33 U.S.C. § 1314(f) | 15 |
| 33 U.S.C. § 1314(f)(2) | 15 |
| 33 U.S.C. § 1314(f)(2)(A) | 15 |

| | Page |
|---|---|
| 33 U.S.C. § 1314(f)(2)(C) | 15 |
| 33 U.S.C. § 1314(f)(2)(F) | 15 |
| 33 U.S.C. § 1315 | 13 |
| 33 U.S.C. § 1341 | 8 |
| 33 U.S.C. § 1341(a) | 24 |
| 33 U.S.C. § 1341(a)(1) | 13 |
| 33 U.S.C. § 1341(d) | 13, 24 |
| 33 U.S.C. § 1342 | 14 |
| 33 U.S.C. § 1342(a) | 6 |
| 33 U.S.C. § 1342(a)(1) | 12 |
| 33 U.S.C. § 1342(a)(2) | 12 |
| 33 U.S.C. § 1342(b) | 6 |
| 33 U.S.C. § 1362(6) | 6, 7, 15 |
| 33 U.S.C. § 1362(7) | 6, 7, 9, 26 |
| 33 U.S.C. § 1362(12) | 6, 7 |
| 33 U.S.C. § 1362(14) | 7, 9, 15 |
| 33 U.S.C. § 1362(17) | 26 |
| 33 U.S.C. § 1370(2) | 17 |



| | Page |
|---|---|
| **FEDERAL REGULATIONS** | |
| 40 C.F.R. § 121.2(a)(3) | 13 |
| 40 C.F.R. § 122.1(b) | 6 |
| 40 C.F.R. § 122.2 | 7, 9 |
| 40 C.F.R. § 122.23 | 15, 23 |
| 40 C.F.R. § 122.26 | 23 |
| 40 C.F.R. § 122.26(a)(1)(ii) | 15 |
| 40 C.F.R. § 122.26(a)(9)(i) | 15, 23 |
| 40 C.F.R. § 122.26(b)(14)(iii) | 15 |
| 40 C.F.R. § 122.26(b)(14)(x) | 15, 23 |
| 40 C.F.R. § 122.26(b)(15)(i) | 15, 23 |
| 40 C.F.R. § 122.30 | 23 |
| 40 C.F.R. § 122.34(b)(4)(i) | 23 |
| 40 C.F.R. § 122.37 | 23 |
| 40 C.F.R. § 122.44(d) | 12 |
| 40 C.F.R. § 122.44(d)(1) | 6 |
| 40 C.F.R. § 122.44(d)(1)(i) | 12 |

Page

40 C.F.R. § 122.44(d)(1)(vii) ..... 13

40 C.F.R. § 122.47 ..... 26

40 C.F.R. § 130.7 ..... 13

40 C.F.R. § 131.3(b) ..... 11

40 C.F.R. § 131.10 ..... 10

40 C.F.R. § 131.10(a) ..... 11

40 C.F.R. § 131.11 ..... 10

40 C.F.R. § 131.12(a)(2) ..... 14

63 Fed. Reg. 69394 (Dec. 16, 1998) ..... 22

66 Fed. Reg. 1671 (Jan. 9, 2001) ..... 12

**STATE REGULATIONS**

N.Y. Comp. Codes R. & Reg., tit. 6 § 701.2 ..... 11

N.Y. Comp. Codes R. & Reg., tit. 6 § 701.5 ..... 11

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N.Y. Comp. Codes R. & Reg., tit. 6 § 701.9 ..... 11

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Page

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## INTEREST OF AMICI CURIAE

The *amici curiae* States, through their Attorneys General, respectfully urge affirmance of the court of appeals' decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), which held that the Clean Water Act (the "Act"), 33 U.S.C. §§ 1251, *et seq.*, requires a permit where a "point source" conveys water containing pollutants from one distinct water body to another, even though the point source is not the original source of pollutants.

Water is diverted from its natural flow and transferred from one body to another to facilitate a variety of activities, including aquaculture, irrigation, community drainage, and coal-bed methane gas extraction. In some circumstances – the diversion of water infested with an invasive species into an uninfested water body, the drainage of polluted run-off into sensitive worksheds, and the disposal of chemical-laden ground water into surface waters, for instance – these human-induced transfers adversely affect water quality. The Eleventh Circuit and three other courts of appeal have construed the Act to provide States with an effective mechanism for ameliorating, where necessary, the consequences of such transfers. The contrary interpretation advanced by Petitioner would leave largely unregulated many transfers of lower-quality water into bodies of higher-quality water, thereby creating a significant gap in the States' authority under the Act to protect and maintain the quality of the waters within their borders.

*Amici* States, most with delegated enforcement authority from the United States Environmental Protection Agency ("EPA"), have a significant interest in the present case because they are tasked with protecting their citizens' health and welfare. The forty-five States with delegated authority have primary responsibility, in partnership with EPA, for enforcing the Act's cornerstone requirement that pollutants not be discharged from a point source into the "navigable waters" of the United States, except in accordance with a National Pollutant Discharge

Elimination System ("NPDES") permit. Over the past 30 years, the States have worked to implement this requirement and related provisions of the Act with the aim of assuring that each individual body of water ultimately achieves and maintains compliance with its applicable water quality standards.

To this end, States have classified each surface water body within their boundaries to establish its "designated use"; promulgated water quality criteria in conjunction with EPA that specify maximum pollutant levels for each water body within their borders; and invested tremendous resources in the scientific staff necessary to ensure that tens of thousands of NPDES permits contain pollutant limitations designed to protect and maintain the quality of the specific water body into which pollutants are discharged. The States also have assessed each water body that has not yet achieved compliance with water quality standards, and developed water pollution budgets and remedial plans to bring these bodies into compliance with applicable water quality standards. Given these extensive efforts, the *amici* States have a significant interest in assuring that their finely-tuned programs to assess, protect, and improve the water quality of each surface water body within their borders are not frustrated by a construction of the Act that constrains state authority to control, through the permitting process, the transfer of pollutants from lower-quality waters to higher-quality waters.

Furthermore, the *amici* States have a strong interest in ensuring a strong "national floor" of water quality controls through the Act's permitting requirement. These requirements, approved by EPA, prevent States from relaxing their own standards and enforcement efforts in order to gain a perceived market advantage in the siting of industrial or commercial facilities at the economic or environmental expense of other States. Moreover, because watersheds do not respect political boundaries, downstream States have a substantial interest in protecting their water bodies through the uniform processes and remedies provided by the Act against the transfer of pollutants originating in upstream States.



## SUMMARY OF ARGUMENT

The Act's NPDES permit program is the primary means for protecting and improving water quality within the comprehensive regulatory regime established by Congress. This program requires EPA and delegated States to consider the impact of pollutants on a water body; review viable options that would have a lower impact; and require application of pollutant control technologies and sensible management practices, all in an effort to prevent water quality from falling below acceptable levels. The decision below applying the Act's permit requirement to the conveyance, through a point source, of water containing pollutants should be affirmed based on well-established principles of statutory interpretation. Moreover, affirmance is necessary to ensure that the Act remains a vital tool to protect and improve the Nation's waters.

1. The Act's comprehensive goals, plain language, structure, and implementing regulations demonstrate that a permit is required for the transfer of water containing pollutants from one body to another, where the receiving body would not otherwise be burdened with the additional pollutants but for transfer through the point source. The cases upon which Petitioner relies to argue that a permit is not required are inapposite, for they involve discharges of pollutants from dams, which merely recirculate water, and not, as is the case here, the artificial diversion of water from its natural course. Moreover, Petitioner's assertion that a permit is required only if the point source itself is the original source of the added pollutant is contrary to the Act's plain language and EPA regulations.

Nor do the arguments raised by Petitioner and its *amici* warrant a narrower construction of the Act. By mandating efforts to assure the quality of each individual water body, the Act and EPA regulations squarely reject the theory, advanced by the United States, that once pollutants enter one water body anywhere in the Nation, they may be conveyed through a point source to any other water body without coming within the scope

of the Act's permit requirement. Numerous water quality protection measures established by the Act that focus on water bodies in a discrete and individualized manner would be frustrated by an interpretation of the Act that treats these bodies as one unified whole.

Likewise, there is no support for the contention that point source transfers of water containing pollutants should be addressed solely through "nonpoint" source programs – *i.e.*, programs designed to control diffuse runoff not discharged through a discrete conveyance. Although the Act notes that some activities – including the activities of water diversion facilities – may be sources of nonpoint pollution, nothing in the Act dispenses with the need also to obtain an NPDES permit in connection with point source discharges that may result from these activities. In any event, nonpoint source programs and state water quality programs have – both before passage of the Act and in the over three decades since – proven largely inadequate for achieving mandated water quality standards, as evidenced by the fact that almost half of the Nation's waters remain impaired, typically from sources not controlled by NPDES permits. Similarly, state water allocation programs generally do not adequately protect water quality.

2. As a result, a rule that effectively divests delegated States (or EPA, in nondelegated States) of the authority to require NPDES permits for transfers of water containing pollutants could seriously harm water quality throughout the Nation. Salt water could be transferred into fresh water, sediment-laden water could be sent into clear drinking water reservoirs, warm waters could be pumped into cold water habitats, chemical-laden waters could be dumped into waters employed in farm and ranch irrigation, and invasive species could be transferred into waters not yet infested. It would be strikingly incongruous for the Act, given its comprehensive



scope, to place such problematic point source additions of pollutants beyond the reach of the Act's permit requirement.

3. To require EPA or delegated States to issue permits in accordance with the Act for interbasin point source transfers containing pollutants will not unduly tax the resources of regulators, as permitting authorities already issue hundreds of thousands of permits as a matter of course. Pennsylvania, for instance, has required NPDES permits for interbasin point source transfers of polluted water since 1986.

Moreover, to the extent that regulated parties may complain that the permitting process is time-consuming and costly, NPDES permits are readily available where the transferred water is of a quality that will not degrade the quality of the receiving water, which is the case in the vast majority of transfers. As the permitting authority in most circumstances, delegated States have the ability to expedite action on NPDES permits. And, where technological or cost limitations make it necessary, the NPDES program provides for "schedules of compliance" to allow for the long-term implementation of corrective measures necessary to achieve compliance, while allowing important but problematic water diversions to continue in the interim.

## ARGUMENT

### I. THE ACT REQUIRES AN NPDES PERMIT FOR WATER TRANSFERS THAT INTRODUCE POLLUTANTS THAT WOULD NOT HAVE ENTERED THE RECEIVING WATER BODY BUT FOR THE POINT SOURCE.

#### A. The Text of the Act and EPA Regulations Demonstrate That Transfers of Water Through a Point Source Are Subject to the Act's Permit Requirement.

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2003). As part of the comprehensive program to implement the Act's objectives, Congress declared that "the discharge of any pollutant by any person" into navigable waters "shall be unlawful," *id.* § 1311(a), unless it is in accord with an NPDES permit (or state analog), *id.* §§ 1342(a), (b). The Act's permit program is the "primary means" for protecting and improving water quality within the "comprehensive regulatory regime" established by Congress. *Arkansas v. Oklahoma*, 503 U.S. 91, 99, 101 (1992). Whether issued by EPA or a delegated State, an NPDES permit sets forth the conditions for the discharge of pollutants consistent with various other applicable provisions of the Act, to assure that each receiving water body will achieve or continue to achieve applicable "water quality standards." *Id.* §§ 1311(b)(1)(C), 1312(a), 1313(a)-(c); 40 C.F.R. § 122.44(d)(1) (2003).

As noted, the Act requires a permit for the "discharge of a pollutant" from a "point source" into "navigable waters." *See* 33 U.S.C. §§ 1311(a); 1342(a), (b); 1362(6), (7), (12), (14); *see also* 40 C.F.R. § 122.1(b). The Act's broad



definitions of these key terms make clear that Congress intended the Act to cover water transfers like those at issue here. "[D]ischarge of a pollutant" is defined in pertinent part as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Point source," in turn, is expansively defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14). The definitions of "pollutant," *id.* § 1362(6), and "navigable waters," *id.* § 1362(7), are similarly broad.

EPA regulations, which are entitled to deference,[1] further confirm that the water transfer here – the pumping of polluted water from the C-11 Canal into Water Conservation Area 3-A – requires an NPDES permit. EPA defines "[d]ischarge of a pollutant" to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." 40 C.F.R. § 122.2. Because the contested activity here involves "surface runoff which is collected or channelled by man" and "discharges through pipes . . . or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works," a permit is required.

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1. EPA's long-standing regulation interpreting what constitutes a "discharge of a pollutant" is reasonable and entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See PUD No. 1 v. Resources Washington Dep't of Ecology*, 511 U.S. 700, 712 (1994) (holding that EPA regulation is a "reasonable interpretation" of the Act "entitled to deference").

The dam cases upon which petitioner relies (Pet. Br. 31-32) are not to the contrary. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), held that dam-induced changes to water quality fall outside the Act's permit requirement. However, discharges from dams are qualitatively different from the interbasin transfers of water at issue in more recent and relevant cases decided by the First, Second, and Eleventh Circuits, *see infra* Point II, because the former involve the mere "recirculation of water," whereas the latter involve the "artificial diver[sion] of water from its natural course." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 491-92 (2d Cir. 2001). Outside the dam context, courts of appeals consistently have held that an NPDES permit is required where a point source conveys water containing pollutants from one distinct water body to another, even though the point source is not the original source of pollutants. *Miccosukee Tribe*, 280 F.3d at 1366-69; *Catskill Mts.*, 273 F.3d at 489-94; *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996).[2]

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2. If the dam context is determined to be factually indistinguishable from the facts of this case, however, it would become apparent that the dam cases were wrongly decided. Indeed, the two cases on which Petitioner relies accorded undue deference to an EPA position, stated in opinion letters and reports to Congress in the 1970s and 1980s, that no permit is required for the discharge of pollutants from dams. That position "was never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act." *Catskill Mts.*, 273 F.3d at 490; *see also Miccosukee Tribe*, 280 F.3d at 1368 n.4 (finding deference in *Gorsuch* and *Consumers Power* unwarranted). In any event, it is unclear whether *Gorsuch* and *Consumers Power* remain valid after *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 722-23 (1994), which held that 33 U.S.C. § 1341, the Act's certification requirement (discussed *infra* Point I.B.2), applies to dam discharges.



Petitioner also argues that a permit is required only if the point source itself is the original source of the pollutant (Pet. Br. 20), but this contention turns a blind eye to the Act's and EPA's definition of "point source" as a discrete conveyance, such as a pipe or a ditch. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. "[A] 'pipe, ditch, channel, tunnel, [or] conduit' is unlikely to have created the pollutants that it releases, but rather transports them from their original source to the destination water body." *Catskill Mts.*, 273 F.3d at 493. Petitioner's argument also is "inconsistent with [EPA's] own regulations, which define 'discharge of a pollutant' to include 'surface runoff which is collected or channelled by man.' Thus, EPA regulates the channel as a point source even though pollutants merely pass through it from land to navigable water." *Gorsuch*, 693 F.2d at 175 n.58 (citation omitted). Indeed, even the United States, one of petitioner's *amici*, rejects this theory (U.S. Br. 21-22), noting that one of the most common types of permitted facility – the sewage treatment plant – does not itself add any pollutants to the water.

### B. The Act's Structural Focus on the Quality of Each Distinct Water Body Refutes the Theory That the Act Treats the "Waters of the United States" As a Unitary Whole.

By mandating efforts to assure the quality of each individual water body, the Act and EPA regulations squarely reject the theory, advanced by *amicus curiae* United States, that once pollutants enter one water body anywhere in the Nation, they may be conveyed through a point source to any other water body, without coming within the scope of the Act's permit requirement. According to the United States, the Act's use of the term "navigable waters," 33 U.S.C. § 1362(7), signals a congressional intent that "'the waters of

the United States' should be viewed as a whole for purposes of NPDES permitting requirements" (U.S. Br. 19).[3]

This argument is untenable. The Act establishes numerous water quality protection programs that operate in conjunction with the Act's permit requirement to improve or maintain water quality by protecting individual water bodies. These measures, which demonstrate that Congress intended to distinguish between discrete water bodies throughout the Nation, would be significantly undermined if the Act's fundamental permitting requirement were read to exclude the transfer of pollutants from one water body to another.

### 1. The establishment of designated uses, water quality criteria, and NPDES permit conditions refutes the United States' theory.

The United States' "unified water" theory flies in the face of the Act's water-body by water-body approach to assuring water quality. The Act contemplates that delegated States will make individualized determinations in classifying and designating the uses of each water body within their borders; in establishing water quality criteria applicable to each body of water; and in issuing NPDES permits to regulate and control, on a case-by-case basis, the discharge of pollutants into each such body.

The Act and EPA regulations require each State to issue "water quality standards" that consist of two major elements: (i) "the designated uses of the navigable waters involved"; and (ii) "the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11.

3. Of course, whereas EPA's regulations are entitled to *Chevron* deference, *see supra* note 1, the same cannot be said of the United States' brief to this Court. *See United States v. Mead Corp.*, 533 U.S. 218, 238 n.19 (2001) (refusing to accord deference to United States' brief).



To establish the designated use (or "classification") of each body of water, States "must take into consideration the use and value" of each water body "for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.10(a). This is a tedious and labor-intensive process. New York, for example, has classified all of its waters in seven volumes of regulations issued by its Department of Environmental Conservation. N.Y. Comp. Codes R. & Regs., tit. 6, §§ 800.1-941.9 (2003).

Classifications vary depending on the attributes and purposes served by the water body. New York designates fresh waters, *inter alia*, "Class N" (water free of pollutants that may be enjoyed in its "natural condition"), *id.* § 701.2; "Class AA" (water that may be used as a drinking water source after simple disinfection), *id.*, § 701.5; "Class B" (water of sufficient quality to allow for contact recreation and fishing), *id.* § 701.7; and "Class D" (water that will allow for fish survival but not fish propagation), *id.* § 701.9.

Apart from designating the uses of their bodies of water, the Act also requires States to establish "water quality criteria." 33 U.S.C. § 1313(c)(2)(A). "Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b). Depending on a water body's particular designated use, the stringency of applicable water quality criteria may vary substantially. *See, e.g.*, N.Y. Comp. Codes R. & Regs., tit. 6, § 703.5(f). With respect to

phosphorus, the pollutant of concern here, EPA has developed guidance targeted at the attributes and designated uses of particular bodies of water.[4]

After a State has designated the use and water quality criteria applicable to particular bodies of water, it may issue, on a case-by-case basis, an NPDES permit. For each discharge of a pollutant, the permit imposes limitations to prevent excursions above the state water quality standards applicable to the specific receiving water body affected by the discharge. 33 U.S.C. §§ 1342(a)(1), (2); 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1)(i). The calculation of how much of a particular pollutant the permit applicant may discharge without running afoul of water quality criteria involves a complex assessment of numerous factors, including the current concentration of the pollutant in the receiving water, human health impacts, the sensitivity of any affected species to the pollutant, and the dilution rate of the receiving water. *See* 40 C.F.R. § 122.44(d).

To abrogate the permit requirement and adopt the United States' dubious theory would be manifestly inconsistent with the Act, and deprive States of effective tools to monitor, maintain, and achieve water quality consistent with the designated use and water quality criteria applicable to each individual water body within their borders.

**2. Other measures aimed at water quality standard compliance also dispel the "unified water" theory.**

The Act establishes a number of additional regulatory mechanisms that further operate to ensure compliance with the different water quality standards applicable to every

4. *See* 66 Fed. Reg. 1671 (Jan. 9, 2001) (Nutrient Criteria Development; Notice of Ecoregional Nutrient Criteria).



individual water body. These mechanisms underscore the importance of Act's permit requirement, and further dispel the United States' "unified water" theory.

*First*, the Act requires States to assess their waters and identify each water body that has not achieved compliance with water quality standards, despite implementation of effluent limitations and thermal controls contained in NPDES permits. 33 U.S.C. §§ 1313(d)(1)(A), (B); 1315. For each non-compliant body, States must develop water pollution budgets and remedial pollutant loading allocations, known as "total maximum daily loads" ("TMDLs"), to address both piped ("point") and diffuse ("nonpoint") sources of pollutants in an effort to achieve compliance with applicable water quality standards. *Id.* §§ 1313(d)(1)(C), (D); 40 C.F.R. § 130.7. Once established, the loads assigned to point sources in the TMDL process are incorporated into NPDES permits. 40 C.F.R. § 122.44(d)(1)(vii).

*Second*, the Act provides that prior to undertaking any project that requires a federal license or permit and "which may result in any discharge into the navigable waters," 33 U.S.C. § 1341(a)(1), a permit applicant first must obtain a certification from the State that the project will not violate applicable state water quality standards, 40 C.F.R. § 121.2(a)(3). Like an NPDES permit, the state certification may impose conditions or limitations to ensure compliance with state water quality standards for the affected water body. 33 U.S.C. § 1341(d); *see also PUD No. 1*, 511 U.S. at 708 ("The limitations included in the certification become a condition on any federal license.").

*Third*, the Act and EPA regulations contain an "antidegradation policy," 33 U.S.C. § 1313(d)(4)(B), that requires States to maintain and protect the quality of those water bodies that "exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in

and on the water," 40 C.F.R. § 131.12(a)(2). Under this policy, waters that are cleaner than the criteria for the particular designated use specified must be protected at the actual higher quality, unless water degradation is necessary to support pressing economic or social needs. *Id.*; *see also PUD No.* 1, 511 U.S. at 718-19.

Together, these programs work to prevent the introduction of pollutants that may adversely affect the water quality of each individual water body, and further demonstrate the Act's water-body by water-body approach to assuring water quality. If the Court accepts the United States' view that transfers of water containing pollutants from one body to another are not subject to the technological controls, operational methodologies, or pollutant management practices encompassed by the NPDES permit process and related measures, state efforts to protect individual water bodies would be severely impaired.

### C. Interbasin Point Source Discharges of Pollutants Are Not Adequately Addressed Through Nonpoint Source or Water Allocation Programs.

Despite acknowledging that the pump station here is a "point source" within the meaning of the Act, Petitioner and its *amici* nonetheless contend that the point source discharge of pollutants should be addressed either through nonpoint source programs or state water allocation programs, neither of which mandates NPDES permits. Apart from running afoul of the plain meaning of the Act – which requires a permit for the discharge of pollutants from a point source, *see* 33 U.S.C. §§ 1311(a), 1342 – this argument is flatly contradicted by the Act's structure and consistent interpretation and, if adopted, would severely impair the ability of States to protect and maintain the quality of their waters.



Relying on 33 U.S.C. § 1314(f), Petitioner and *amici* United States and City of New York assert (Pet. Br. 3; U.S. Br. 26; N.Y.C. Br. 14) that the discharge of pollutants from a point source should not be regulated through permits, but by "nonpoint" source programs – *i.e.*, programs that address diffuse runoff not discharged through a discrete conveyance. Although § 1314(f) requires EPA to provide guidance for addressing nonpoint sources of pollution resulting from activities such as agriculture, mining, construction, or "water flow diversion facilities," *id.* § 1314(f)(2)(A)-(C), (F), nowhere does it dispense with the permit requirement for point source discharges from those activities. Indeed, in an EPA enforcement action where a defendant mining company claimed that 33 U.S.C. § 1314(f) obviated the need to obtain an NPDES permit, the Tenth Circuit held that the provision does not create nonpoint source exemptions from the Act's NPDES requirement: "Mining and other categories listed in § 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

Petitioner's reading of 33 U.S.C. § 1314(f) would exclude, for instance, all agricultural activities from the NPDES permit process, even though the Act itself defines "pollutant" to include "agricultural wastes," 33 U.S.C. § 1362(6), and "point source" to encompass a "concentrated animal feeding operation," *id.* § 1362(14). Furthermore, EPA regulations expressly require an NPDES permit for point source discharges from many of the activities listed in 33 U.S.C. § 1314(f)(2), including those involving concentrated animal feeding operations, 40 C.F.R. § 122.23; mining activities, *id.* §§ 122.26(a)(1)(ii), (b)(14)(iii); and construction activities, *id.* §§ 122.26(a)(9)(i), (b)(14)(x), (b)(15)(i), 122.34(b)(4)(i). Because an activity can have both point and nonpoint attributes, this dual approach is necessary to achieve the Act's overall goals and is consonant with the Act's policy of "controlling" nonpoint pollution.

*See* 33 U.S.C. § 1251(a)(7) ("[I]t is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.").

A simple hypothetical demonstrates how nonpoint source controls work in tandem with, rather than to the exclusion of, the Act's permit requirement. If a nonpoint source control in an upstream State fails to fully limit the discharge of pollutants into navigable waters, then as that water moves downstream to an adjacent State and passes through a point source there, the downstream State will be powerless to control the discharge of potentially harmful pollutants into each of its individual water bodies affected by or connected to the point source. Moreover, given that it is all but impossible to control through nonpoint programs some pollutants found in transferred water (like heat or natural salt content), any effort to place point source discharges beyond the Act's NPDES permit program must be rejected.

The United States further contends that nonpoint source programs should govern point source transfers of pollutants from one water body to another because "the operators of water control facilities typically are not responsible for the presence of pollutants in the waters they transport" (U.S. Br. 27). But the point source is an essential place for controlling the discharge of pollutants, regardless of whether water control facilities actually add the pollutants themselves, because the point source controls how, where, and when pollutants from lower-quality waters are added to higher-quality waters. The Act's permit requirement thus enables States, through their water control facilities, to control those pollutants where necessary to achieve the Act's goals.



Petitioner and *amici* States Colorado and New Mexico further suggest (Pet. Br. 35; Colo. Br. 6-15) that by reserving to States the authority to allocate water, the Act exempts water transfers from NPDES permitting requirements. Although 33 U.S.C. § 1251(g) vests States with the authority to "allocate quantities of water,"[5] neither that provision, nor 33 U.S.C. § 1370(2) – which provides that nothing in the Act should impair any right of the "States with respect to the waters . . . of such States," dispenses with the need to obtain an NPDES permit for interbasin transfers of water that involve the discharge of pollutants from a point source.

Indeed, this Court has held that those provisions "preserve the authority of each State to allocate water quantity as between users," but "do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *PUD No. 1*, 511 U.S. at 720. The primary "water pollution control" contemplated by the Act is, of course, the NPDES permitting process itself. *See Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) ("[W]here both the state's interest in allocating water and the federal government's interest in protecting the environment are

5. Section 1251(g) provides:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

implicated, Congress intended an accommodation" to be "best reached" through "the individual permit process.").[6]

Finally, nonpoint source and water allocation programs have not sufficiently protected our waters, even when employed in conjunction with state water quality laws. To be sure, the simple prohibition on waste disposal touted by some *amici* as a substitute for the NPDES permit process (*see* Colo. Br. 23-26) hardly prevented the deleterious discharges at issue here, or in the water transfer cases discussed *infra* Point II. Moreover, as EPA's most recent survey has found, nearly half of the Nation's waters remain impaired, typically from sources not controlled by NPDES permits.[7] To require point source discharges of pollutants involved in water transfers to be addressed solely through nonpoint source and water allocation programs therefore will frustrate the Act's goals of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

## II. A PERMIT REQUIREMENT FOR INTERBASIN TRANSFERS OF WATER INVOLVING THE ADDITION OF A POLLUTANT FROM A POINT SOURCE ENABLES STATES TO PROTECT WATER QUALITY.

The Court should affirm the Eleventh Circuit's decision to ensure that the Act continues to address serious environmental harms. The permitting process enables States to control the discharge of damaging pollutants, and thereby protect the quality of their receiving waters. If a permit is

6. In any event, the transfer of water here is not a true allocation, but rather the interbasin disposal into the Everglades of polluted collected runoff.

7. U.S. EPA, *National Water Quality Inventory: 2000 Report* (Aug. 2002 Fact Sheet) (available at http://www.epa.gov/305b/2000report/).



not required for the addition of a pollutant from a lower-quality water body to a higher-quality water body that, but for the operation of a point source, would not otherwise flow into one another, the States' primary means under the Act to control the discharge of pollutants will be weakened immeasurably.

Decisions from other courts of appeal in circumstances analogous to those presented here highlight the harm of dispensing with the permit requirement. In *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), a ski slope sought to pump water from the East Branch of the Pemigewasset River into Loon Pond, a water body within the White Mountain National Forest. 102 F.3d at 1277-78. Loon Pond is a high-altitude water body "unusual for its relatively pristine nature;" it serves as a drinking water supply for the Town of Lincoln, New Hampshire. *Id.* at 1277. In fact, New Hampshire classified Loon Pond "as a Class A waterbody, protected by demanding water quality standards under a variety of criteria." *Id.* The East Branch, by contrast, "is a relatively unprotected Class B waterway under New Hampshire law." *Id.* at 1279. Indeed, the court took judicial notice that for years the East Branch was "one of the most polluted rivers in New England, the repository of raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel paint off buildings located on its banks." *Id.* at 1297. Because East Branch water, which otherwise would not have flowed into Loon Pond but for its routing by the ski operation, *id.* at 1297, contained "bacteria, other aquatic organisms such as Giardia lambia, phosphorus, turbidity and heat," *id.* at 1278, the First Circuit held that an NPDES permit was required for the transfer, which added pollutants from a point source to a navigable water, *id.* at 1296-1299.

In *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155 (9th Cir.),

*cert. denied*, __ U.S. __, 72 U.S.L.W. 3280 (Oct. 20, 2003), a company extracted methane gas from deep underground coal seams in Montana and, in the process, drew large quantities of deep ground water to the surface. *Id.* at 1158. The company did not add any chemicals to the water before dumping it into the Tongue River. *Id.* In its "natural state," however, the water contained suspended solids, calcium, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, fluoride, aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium. *Id.* Further, the ground water was "salty," raising concerns by those using the Tongue River for agricultural irrigation that the salt would break down the soil structure on farms and ranches. *Id.* The court held that an NPDES permit was required under the "plain language" of the Act. *Id.* at 1160. "Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a 'pollutant,' even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly undermine the integrity of [the Act's] prohibitions." *Id.* at 1162 (internal quotations omitted).[8]

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), the Second Circuit similarly held that the transfer by tunnel of turbid, sediment-laden water from the Schoharie Reservoir to the Esopus Creek, a trout creek several miles away that empties into a reservoir which provides drinking water for New York City, requires an NPDES permit. *Id.* at 484-85, 489-94. The court reasoned that a contrary holding "would mean that movement of water from one discrete water body to another would not be an addition [within the meaning of the Act]

8. In fact, the court found that to not require a permit would pave the way for someone to pipe "the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the [Act.]" *Id.* at 1163.



even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants." *Id.* at 493.[9]

The pollutant at issue here, the nutrient phosphorus, provides a common, yet potent, example of why the Act requires a permit for interbasin transfers of water like that in the present case. *See Miccosukee Tribe*, 280 F.3d at 1366. Excess phosphorus often is the result of upstream activity of sewage treatment plants, agricultural runoff, farm animal waste, urban runoff, sediments washed from construction excavations, lawn fertilizers, or poorly functioning home septic systems.[10] High levels of phosphorus in fresh water systems set off a chain-reaction of events that adversely affect water quality. Excess phosphorus overfertilizes aquatic plants and algae during warm weather,[11] leading to "algae blooms" and limited water transparency.[12] As plants and algae die off, the dead material is consumed by a massively expanding population of bacteria and other animal life. This overabundant population of bacteria consumes the dissolved oxygen in the water, creating an "anaerobic" environment uninhabitable to most fish.[13]

9. *See also Dague v. City of Burlington*, 935 F.2d 1343, 1347, 1349, 1354-55 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992) (requiring permit where leachate-polluted pond water from landfill flowed through a culvert and into a wetland).

10. National Research Council, *Watershed Management for Potable Water Supply*, at 164-65 (National Academy Press 2000) (hereafter "*NRC Report*").

11. *Id.* at 7, 163-64.

12. *Id.* at 106-07.

13. *Id.* at 163-65; *see also* U.S. EPA and U.S. Dep't of Agric., *Clean Water Action Plan: Restoring and Protecting America's Waters* (Feb. 14, 1998), at 56 ("Excessive nutrient loadings will . . . result in excessive growth of macrophytes or phytoplankton and potentially harmful algal blooms . . . , leading to oxygen declines, imbalance of aquatic species, public health risks, and a general decline of the aquatic resource.").

Further, a low-oxygen aquatic environment impairs drinking water because anaerobic water contains a type of bacteria that generates serious odor and taste problems, as well as poor water color.[14] Low levels of oxygen also cause the release of contaminants such as iron, manganese, and hydrogen sulfide from reservoir bottom sediments, which further degrade water quality.[15] Additionally, excess phosphorus encourages the growth of organisms that produce toxins which, at high levels, pose dangers to the health of humans and animals alike.[16] When water containing high levels of organic material (*i.e.*, dead algae and bacteria) is disinfected with chlorine, it creates still other chemicals, which are suspected carcinogens and have been linked to increased risks of early term miscarriages.[17]

EPA has found that phosphorus is a leading cause of water quality impairment. An EPA study released in 2002 reported that in 2000, 45% of the Nation's lake and reservoir acres that were assessed failed to meet applicable state water quality standards, and of those waters so impaired, excess levels of the nutrients phosphorus or nitrogen were to blame in 50% of the cases.[18] Since phosphorus is present in so many

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14. *NRC Report* at 106-07.

15. *Id.* at 163-64.

16. *Id.* at 107, 164.

17. *Id.* at 2, 107, 112-13, 164; *see also* 63 Fed. Reg. 69394 (Dec. 16, 1998) (citing study suggesting association between early term miscarriage and exposure to drinking water with elevated levels of the disinfection byproduct trihalomethane).

18. U.S. EPA, *National Water Quality Inventory: 2000 Report* (released September 2002), at 17-21 (available at http://www.epa.gov/305b/2000report/) (last checked Nov. 14, 2003).



waters, it is likely to be involved in human-induced interbasin water transfers. To devise an exemption from the Act's permit requirement that allows for the transfer of impaired waters to more pristine waters would contravene the unmistakable goals of the Act and seriously harm water quality, in contravention of the unmistakable goals of the Act.

## III. APPLICATION OF THE ACT'S PERMIT REQUIREMENT TO INTERBASIN POINT SOURCE TRANSFERS OF WATER CONTAINING POLLUTANTS IS NOT UNDULY BURDENSOME.

To affirm the Eleventh Circuit's decision and require EPA or delegated States to issue permits for interbasin transfers of water that involve an addition of a pollutant from a point source will not unduly tax the resources or capabilities of regulators. Nor will any ensuing controls on water transfers render the human-induced movement of water unfeasible or impossible.

EPA and delegated States already issue countless permits to address discharges of pollutants in numerous circumstances. NPDES "general permits" cover hundreds of thousands of pollutant discharges from such varied activities as urbanized storm water runoff, 40 C.F.R. §§ 122.26, 122.30-122.37; sediment discharges from construction sites more than one acre in size, 40 C.F.R. §§ 122.26(a)(9)(i), (b)(14)(x), (b)(15)(i), 122.34(b)(4)(i); and concentrated animal feeding operations, 40 C.F.R. §§ 122.23. EPA and delegated States also issue tens of thousands of individual NPDES permits for industrial and sewage treatment facilities.[19] And apart from "general permits" and NPDES permits that cover

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19. *See* http://www.epa.gov/compliance/planning/data (last checked Nov. 14, 2003).

specific situations, States routinely issue permit-like "certifications" with respect to federal projects involving discharges into navigable waters. *See* 33 U.S.C. § 1341(a), (d); *PUD No. 1*, 511 U.S. at 707-08. Indeed, at least one State, Pennsylvania, has issued NPDES permits since 1986 for all interbasin point source transfers of polluted water. *See Del-AWARE Unlimited, Inc. v. Pennsylvania*, 508 A.2d 348, 359 (Pa. Commw. Ct. 1986) (requiring NPDES permit for interbasin water transfer and distinguishing *Gorsuch*, a dam case, because "it dealt with water diversion within a single body of water").[20]

There is no merit to the City of New York's assertion that if upheld, the Eleventh Circuit's decision will require permits for "more than two million dams, and countless other diversion structures, across the nation" (N.Y.C. Br. 13). Whereas the City speculates that each of the 50 States would issue on average at least 40,000 additional new permits, Colorado itself suggests only that "several hundred transbasin diversions/deliveries" in that state conceivably "could require permits under the holding of *Miccosukee*" (Colo. Br. 3 n.2). Issuing the number of additional permits realistically projected by Colorado is eminently feasible, given the number of permits already issued by States, and particularly since "the permitting authority . . . may be able to issue a general permit that considerably streamlines the permitting process" (U.S. Cert. Opp. 17) in instances where the transfer of water does not adversely affect the quality of the receiving water body. It is clear, moreoever, that while New York City has "summon[ed] up a parade of horribles," "[t]he horribles that can be imagined – if they are really so horrible and ever come to pass – can readily be corrected by Congress" should the NPDES permit process as enacted truly prove unworkable in practice. *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 69 (2000) (Scalia, J., concurring).

20. *See also* Pennsylvania Dep't of Envtl. Prot., *Policy for Permitting Surface Water Diversions* (Mar. 1, 1998) (available by searching http://www.dep.state.pa.us/eps/search/search.asp for document "362-2000-003") (last checked Nov. 14, 2003).



Further, the NPDES permitting mandated by the Eleventh Circuit's decision is consistent with fast action. Delegated States have the ability and authority to marshal resources and expedite review. Because these States are familiar with their own water quality criteria and the designated uses of the affected bodies of water, they are well-positioned to act quickly on permit applications (*see* U.S. Cert Opp. 17). Indeed, in most instances, delegated States may issue an NPDES permit based on state-developed water quality standards and – inasmuch as there are no national effluent limitations for water diversions – in keeping with state-established technical, operational, and management protocols.

Nor is it realistic to suggest, as Colorado and New Mexico do (Colo Br. 15-17), that requiring an NPDES permit for transfers of water will effectively prevent such transfers altogether. In most instances, NPDES permits are readily available where the water being transferred is of a quality that would not impair the quality of the receiving water.[21] Indeed, receiving waters frequently can accommodate or assimilate pollutants without violating water quality standards. For this reason, permits are granted in many delegated States for water transfers intended for drinking use or farm irrigation.

Even where there is a likelihood that a proposed water transfer will impair the quality of the receiving water body, the NPDES program provides EPA and delegated States with the ability to require the implementation of pollutant removal technologies, management practices, and operational

21. Colorado, for example, notes that "[o]f its 107,403 miles of streams, only 4,964 (4.6%) are designated as 'impaired,' not meeting water quality standards or designated uses, under the Clean Water Act, 33 U.S.C. § 1313" (Colo. Br. 3 n.2).

modifications. *See* 33 U.S.C. §§ 1314(c), (e). Moreover, the Act and its underlying regulations provide for "schedules of compliance" to allow long-term implementation of corrective measures necessary to achieve compliance with applicable water quality standards, while allowing important, though problematic, water diversions to continue in the short-term. 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47. Indeed, the United States has recognized that "an NPDES permit can provide considerable flexibility in any schedules for compliance" (U.S. Cert. Opp. 17). *Cf. Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 495 (2001) (Breyer, J., concurring) (noting numerous inherent flexibilities in the Clean Air Act "sufficient to avoid the extreme results that some of the industry parties fear").

There is, therefore, no basis for creating an exception to the Act's permit requirement on the ground of necessity. In fact, the Eleventh Circuit's decision to affirm that a permit is required under the circumstances but to vacate the injunction prohibiting the operation of the pump station at issue, *Miccosukee Tribe*, 280 F.3d at 1369-1371, demonstrates that the Act strikes a reasonable and appropriate balance where competing considerations are at stake. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (courts may exercise equitable discretion to allow vital discharges that otherwise violate Federal Water Pollution Control Act to continue pending application for permit).



## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.,
*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

## BRIEF OF *AMICI CURIAE* FORMER ADMINISTRATOR CAROL M. BROWNER, FORMER ASSISTANT ADMINISTRATORS CHARLES FOX AND ROBERT W. PERCIAEPE AND FORMER GENERAL COUNSELS JONATHAN Z. CANNON AND JEAN I. NELSON OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

The Clean Water Act defines a "point source" as "any discernible, confined, and discrete conveyance including * * * any pipe" and further defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1362(12)&(14). Petitioner operates a pumping station that consists of three pipes, each of which conveys 960 cubic feet of water per second containing high concentrations of phosphorous into a pristine body of navigable waters within the Florida Everglades. The question presented is:

Whether petitioner's operation of its three pipes constitutes a "discharge of a pollutant," within the meaning of the Clean Water Act.

## Table of Contents


Question Presented ..... i
Interest of Amici ..... 1
Statement ..... 2
Introduction and Summary of Argument ..... 2
Argument ..... 4
I. The plain meaning of the Clean Water Act compels the conclusion that petitioner's three pipes result in point source discharges .... 4
A. Petitioner's pipes result in point source discharges because they are discernible conveyances that add pollutants to a navigable water body ..... 5
B. EPA's consistent interpretation of the Clean Water Act and its congressional amendment confirm the statute's plain meaning ..... 8
C. Petitioner's reading threatens well established and important Clean Water Act programs ..... 12
D. The Solicitor General's alternative interpretation of the Clean Water Act is equally flawed ..... 14
II. Petitioner's reliance on "principles of statutory interpretation" to defeat the Clean Water Act's plain meaning is misplaced ..... 19
A. The plain meaning of a statute is controlling ..... 19
B. Application of the Clean Water Act according to its plain terms neither raises serious federalism concerns nor otherwise leads to any absurd or disastrous consequences ... 21

1. The Clean Water Act, including Section 402, directly incorporates rather than transgresses state sovereign prerogatives ..... 21
2. Subjecting petitioner's pumping station to Section 402 would not lead to massive administrative burdens on state authorities ..... 23

III. Petitioner's sole recourse is to persuade Congress of the merits of their policy arguments ..... 28

Conclusion ..... 30

Appendix ..... A-1



## Table of Authorities

Cases:

*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ..... 13

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... 4, 16, 19, 25

*Church of Holy Trinity v. United States*, 143 U.S. 457 (1892) ..... 23

*Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993) ..... 13

*Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) ..... 13

*Diamond v. Chakrabarty*, 447 U.S. 303 (1980) ..... 20, 29

*Dubois v. United States Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996) ..... 13

*E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) ..... 22

*EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980) ..... 22

*Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) ..... 4

*Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991) ..... 29

*Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) ..... 29

*Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) ..... 4

*International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ..... 21, 22

Cases (continued):

*Montgomery Environmental Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980) ..... 13
*National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) ..... 20
*National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) ..... 9, 10, 12, 27
*Pennsylvania Dept. of Corrections v. Yesky*, 524 U.S. 206 (1998) ..... 20
*PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) ..... 20
*Public Utility Dist. No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) ..... 11, 23
*Salinas v. United States*, 522 U.S. 52 (1997) ..... 20
*Sierra Club v. Abston Construction Co.*, 620 F.2d 41 (5th Cir. 1980) ..... 12, 13
*United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) ... 15
*United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) ..... 12, 13
*United States v. Mead Corp.*, 533 U.S. 218 (2001) ..... 19
*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... 15, 20-21, 21
*United States v. Turkette*, 452 U.S. 576 (1981) ..... 20
*Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001) ..... 6-7, 11

Statutes and Regulations:

Clean Air Act, 42 U.S.C. § 7409 ..... 23
Clean Water Act, 33 U.S.C. §§ 1251 *et seq* ..... *passim*
Subch. I, 33 U.S.C. §§ 1251-1274
§ 101(g), 33 U.S.C. 1251(g) ..... 10, 11



Statutes and Regulations (continued):

Clean Water Act
Subch. II, 33 U.S.C. §§ 1281-1301
§ 208, 33 U.S.C. § 1288 ..... 11
§ 208(b)(2)(F), 33 U.S.C. § 1288(b)(2)(F) ..... 12
Subch. III, 33 U.S.C. §§ 1311-1330
§ 301, 33 U.S.C. § 1311 ..... 5, 11, 15
§ 301(a)-(b), 33 U.S.C. § 1311(a)-(b) ..... 7
§ 301(b), 33 U.S.C. § 1311(b) ..... 22
§ 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) ..... 23
§ 301(g), 33 U.S.C. § 1311(g) ..... 30
§ 301(h), 33 U.S.C. § 1311(h) ..... 7, 30
§ 301(i), 33 U.S.C. § 1311(i) ..... 30
§ 303(a), 33 U.S.C. § 1313(a) ..... 23
§ 303(a)-(d), 33 U.S.C. § 1313(a)-(d) ..... 23
§ 303(c), 33 U.S.C. § 1313(c) ..... 23
§ 303(d) 33 U.S.C. § 1313(d) ..... 23
§ 304(b), 33 U.S.C. § 1314(b) ..... 22
§ 304(e), 33 U.S.C. § 1314(e) ..... 12
§ 304(f), 33 U.S.C. § 1314(f) ..... 10
§ 304(f)(2), 33 U.S.C. § 1314(f)(2) ..... 11,12
§ 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F) ..... 11
Subch. IV, 33 U.S.C. §§ 1341-1346
§ 402, 33 U.S.C. § 1342 ..... *passim*
§ 402(a), 33 U.S.C. § 1342(a) ..... 22
§ 402(a)(1), 33 U.S.C. § 1342(a)(1) ..... 19
§ 402(b), 33 U.S.C. § 1342(b) ..... 22
§ 402(l), 33 U.S.C. § 1342(l) ..... 30
§ 402(l)(1), 33 U.S.C. § 1342(l)(1) ..... 24
§ 402(l)(2), 33 U.S.C. § 1342(l)(2) ..... 10
§ 402(p), 33 U.S.C. § 1342(p) ..... 30
§ 404, 33 U.S.C. § 1344 ..... 27

Statutes and Regulations (continued):

Clean Water Act
Subch. V, 33 U.S.C. §§ 1361-1377
§ 502, 33 U.S.C. § 1362 ..... 5
§ 502(6), 33 U.S.C. § 1362(6) ..... 5
§ 502(7), 33 U.S.C. § 1362(7) ..... 16
§ 502(12), 33 U.S.C. § 1362(12) ..... *passim*
§ 502(14), 33 U.S.C. § 1362(14) ..... *passim*
Water Quality Act of 1987,
Pub. L. No. 100-4, 101 Stat. 7 (1987) ..... 10
33 C.F.R. § 328.3 (2003) ..... 15
40 C.F.R. § 122.2 (2003) ..... 9
40 C.F.R. § 122.28 (2003) ..... 26
40 C.F.R. § 122.44(a) (2003) ..... 22
40 C.F.R. § 122.47 (2003) ..... 26
40 C.F.R. § 123.25 (2003) ..... 26

Miscellaneous:

*Authority to Exclude Point Sources from the Permit Program*, EPA General Counsel Opinion (August 3, 1973), reprinted in U.S. EPA General Counsel Opinions (Envt'l Law Pub. Serv. 1979) ..... 9, 12
Sir Francis Bacon, The Elements of the Common Lawes of England (1630) ..... 8
Brief for EPA, *Alaska v. EPA*, No. 02-658 ..... 19
*Combined Sewer Outfall Control Policy*, 59 Fed. Reg. 18688 (1994) ..... 7-8
*Del-Aware Unlimited, Inc. v. Pennsylvania*, 1984 Envt'l Hearing Bd. 178 (1984) ..... 28



Miscellaneous (continued):

*Final National Pollutant Discharge Elimination System General Permit for Storm Water Discharges from Construction Activities*, 68 Fed. Reg. 39087 (2003) ..... 27
Florida Dept. of Environmental Protection Emergency Final Order Case DEP No. 99-0385, Website of the Florida Dept. of Envt'l Protection, http://www.dep.state.fl.us/legal/legaldocuments/finalorders/1999/DEP99-0385.doc ..... 27
*Form and Guidelines Regarding Agricultural and Silvicultural Activities*, 38 Fed. Reg. 18000 (1973) ..... 8
National Pollutant Discharge Elimination System, Website of U.S. EPA, http://cfpub.epa.gov/npdes/statestats.cfm ..... 22
*In Re Riverside Irrigation District, Ltd. and 17 others*, Decision of the General Counsel No. 21 (June 27, 1975), *reprinted in* U.S. EPA General Counsel Opinions (Envt'l Law Pub. Serv. 1979) ..... 17, 18
S. Rep. No. 92-414, 92d Cong., 2d Sess. (1972) ..... 21
The Honorable Antonin Scalia, A Matter of Interpretation (1997) ..... 23
Website of the South Florida Water Management District, http://www.sfwmd.gov/org/wrp/wrp_evg/projects/404permit ..... 27

## INTEREST OF AMICI CURIAE

Amici Curiae are a former Administrator, Assistant Administrators, and General Counsels of the United States Environmental Protection Agency.[1] They were each once responsible for administering the Clean Water Act. These responsibilities extended to overseeing the interpretation of the statutory provisions in dispute in this case in general rulemakings and specific permit adjudications. Each amicus has a longstanding professional expertise relevant to the question presented and a strong personal interest in this Court's accurate resolution of the important legal issue raised in this case and the protection of the nation's waters.

At stake in this case is the jurisdictional scope of the Clean Water Act's regulation of point source discharges, which is the single most important aspect of that Act. The statutory constructions advanced by petitioner and their amici, including the Solicitor General, are erroneous, contrary to well-settled understandings, and would devastate the statute's ability to achieve its water quality protection goals.

Under petitioner's view, any point source that did not itself generate in the first instance the pollutants that it conveyed would escape the Section 402 permit requirement. This exemption would extend to many of the most significant point source discharges currently regulated by the Water Act. The Solicitor General's proposed construction of the law is narrower -- all point source discharges between different bodies of navigable water would be exempted -- but at the end of the day would likewise seriously frustrate the law's purposes. A fuller description of the backgrounds of the individual amici is set forth in an appendix to this brief.

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[1] This brief is filed with the parties' written consent, copies of which have been filed with the Clerk. Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part. Only amici or their counsel made a monetary contribution for the preparation or submission of this brief.

## STATEMENT

Amici adopt the Statement set forth in respondents' briefs.

## INTRODUCTION AND SUMMARY OF ARGUMENT

According to petitioner, the conveyance by three massive pipes of 960 cubic feet per second of heavily polluted water into a pristine body of navigable waters does not constitute an "addition of any pollutant to navigable waters from any point source" within the meaning of the Clean Water Act, 33 U.S.C. § 1362(12). The plain meaning of the statutory language compels rejection of that argument.

Every element of a point source discharge is presented by the facts of this case. The statute expressly defines "point source" to include a "pipe." The phosphorous that those pipes convey are clearly "pollutants." And, the receiving waters to which those pipes directly add their contaminated effluent are indisputably "navigable."

Resisting the plain meaning of the statutory language, petitioner contends that affirmance of the court of appeals' judgment would transgress principles of federalism by subjecting water allocation management to federal water pollution control requirements. Petitioner's reliance, however, on principles of federalism and related canons of statutory construction is triply misplaced.

1. First, the only canon of statutory construction relevant to this case is that where, as in this case, the meaning of the relevant statutory language is clear, that is the end of the judicial inquiry. No matter how many powerful entities may prefer a different policy result, the short answer is that the courts are not the constitutionally accepted avenue for securing an amendment of an Act of Congress. Indeed, the presence of so many powerful interests in support of petitioner's preferred policy simply underscores the fundamental importance of safeguarding the exclusive constitutional design for lawmaking. There is certainly little reason for concern that these same entities will prove powerless to have their voices heard in the halls of Congress.



2. The exaggerated claims set forth by petitioner and its amici of the dire consequences of affirming the judgment below are, moreover, completely misdirected. There will be no widespread imposition of federal water pollution control requirements on state water allocation programs. The kind of direct pumping of large amounts of pollutants from one body of water to another distinct pristine water body presented by this case is readily distinguishable from traditional water allocation and management activities undertaken by state and local governments. The Clean Water Act already expressly excludes from Section 402 permit requirements the vast majority of those traditional water allocation activities, including all withdrawals from water bodies and all irrigation return flows. And, even for any other traditional water allocation programs for which an exclusion is not so clear on the face of the statute, there is sufficient statutory ambiguity, as applied to those programs, to provide EPA with the clear discretionary authority to construe the permitting requirements not to apply.

3. The third flaw in petitioner's federalism argument is that it fundamentally misapprehends the actual role that States play in the operation of the Clean Water Act's Section 402 permit program. By deliberate congressional design, it is the States, not EPA, that are primarily responsible for the administration of virtually all aspects of the Clean Water Act Section 402 permit program.

The States can assume primary responsibility for administering the Section 402 permit program and 47 States, including Florida, have chosen to do just that. These States, not EPA, issue the Section 402 permits. And, as the permitting agencies for the kinds of nonindustrial discharges at issue here, they possess considerable discretion in crafting permit requirements. The Clean Water Act, accordingly, promotes rather than transgresses State sovereignty.

4. Finally, while the Solicitor General correctly rejects petitioner's core arguments, his competing interpretation of

the Act -- as exempting discharges between distinct bodies of navigable water -- is also defeated by the plain meaning of the statutory language. The Solicitor General's position is, moreover, flatly inconsistent with the views of EPA, as authoritatively expressed by that Agency as long ago as 1975. It is, moreover, the formal interpretation of EPA, not that expressed in a brief filed by the Solicitor General in litigation on behalf of the "United States," that is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

## ARGUMENT

The judgment of the Eleventh Circuit should be affirmed. It is consistent with the Clean Water Act's plain meaning, statutory structure, and legislative history, EPA's longstanding interpretation, and Congress's revisions of the law. The doomsday rhetoric of petitioner and its amici, notwithstanding, none of their proffered canons of statutory construction for defeating the statute's plain meaning has any bearing on this case. The operation of petitioner's three massive pipes, each of which conveys 960 cubic feet per second of heavily polluted water into a pristine body of navigable waters, is just what it appears to be: an "addition of any pollutant to navigable waters from any point source" requiring a Section 402 permit. 33 U.S.C. §§ 1342, 1362(12).

### I. The Plain Meaning of the Clean Water Act Compels the Conclusion that Petitioner's Three Pipes Result in Point Source Discharges

"As in any case of statutory construction, [this Court's] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999), *quoting* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992). The plain meaning of the Clean Water Act provides just such a "clear answer" to the question presented in this case: The Act's Section 402 permit requirements apply to the operation of petitioner's pumping



station, including its conveyance of contaminated water through three pipes into navigable waters.

### A. Petitioner's Pipes Result In Point Source Discharges Because They Are Discernible Conveyances That Add Pollutants To A Navigable Water Body

1. It is common ground that whether petitioner's pumping station S-9 requires a Section 402 permit turns on whether its operation constitutes a "discharge of any pollutant," within the meaning of Section 301 of the Act, 33 U.S.C. § 1311. It is further common ground that in Section 502, 33 U.S.C. § 1362, Congress expressly provided definitions for several of the Water Act's statutory terms, including the three terms most relevant to determining the scope of Section 402: (1) "discharge of a pollutant"; (2) "pollutant"; and (3) "point source." Each of these statutory definitions is set forth below:

> The term *"discharge of a pollutant"* * * * means * * * "any addition of any pollutant to navigable waters from any point source * * *. 33 U.S.C. §1362(12).
>
> The term *"pollutant"* means * * * solid waste, * * * sewage, * * * chemical wastes * * * or discarded * * * industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. § 1362(6).
>
> The term *"point source"* means any discernible, confined, and discrete conveyance, including but not limited to any pipe * * *. 33 U.S.C. §1362(14).

Petitioner's operation of the three pipes in pumping station S-9 clearly results in a "discharge of any pollutant" within the plain meaning of the Clean Water Act, especially as expressly provided for by the Act's specific definitions. The pipes are without a doubt each a "point source," given that the statutory definition of point source expressly extends to "any pipe." Nor does either petitioner or the Solicitor General here contest that the waters of Water Conservation

Area-3A (WCA-3A) in which those pipes each pump 960 cubic feet of contaminated effluent per second constitute "navigable waters," within the meaning of the Water Act.

The only remaining statutory inquiries, therefore, are whether the operation of these pipes results in an "addition" of pollutants "from" the pipes "to" the receiving body of navigable waters. Here, too, the facts of the case compel an affirmative response. The pipes each convey effluent into the WCA-3A that contains concentrations of phosphorous far higher than those already in the receiving waters. The pipes are the immediate, proximate source of the phosphorous pollutants in the WCA-3A. They are not some remote, incidental but-for cause. Hence, it cannot be seriously gainsaid that there is an "addition" "from" the pipes "to" the WCA-3A of "pollutants."

2. Petitioner nonetheless gamely disputes (Br. 26-29) that the operation of its three pipes constitutes a "discharge" on three distinct, yet ultimately closely related, grounds. According to petitioner, the pipes do not result in an "addition," do not convey "pollutants," and any pollutants that are conveyed by the pipes are not "from" the pipes even if the pipes might otherwise satisfy the definition of a "point source." Each of these arguments rests on the same central fact: the phosphorous did not originate in the point source but was the result of runoff into waters that were subsequently conveyed by petitioner's point sources into the WCA-3A. According to petitioner, the phosphorous lost its status as a "pollutant" prior to reaching petitioner's pipes, petitioner's pipes cannot be deemed to have "add[ed]" pollutants already in water, and the phosphorous cannot be fairly deemed to be "from" petitioner's pipes.

"Were it not for the hundreds of pages of briefing [petitioner and their amici] have submitted on the issue, one would have thought it fairly clear that this text does not permit" any such possible reading of the Clean Water Act. Cf. Whitman v American Trucking Ass'n, 531 U.S 457, 465



(2001). As posed by the Clean Water Act, whether a "discharge" exists turns on whether there is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The only "navigable waters" relevant to that statutory inquiry are the *receiving waters*, or the WCA-3A in this case. And the only relevant question is whether, vis a vis these receiving waters, there was an "addition" of phosphorous "to" these waters and whether that addition came "from" petitioner's three pipes. The indisputable answer to all these questions is "yes."

There is absolutely nothing in the statute's definition of "pollutant" to admit of an interpretation that a pollutant such as phosphorous loses its status as a pollutant (and becomes merely "pollution") once it is being conveyed by water. Nor is there even the remotest ambiguity presented by the term "from" to allow for petitioner's extraordinary claim that the point source must itself be the original source of the pollutant for the pollutant to be "from" the "point source." After all, "point source" is specifically defined to include a "conveyance" (33 U.S.C. § 1362(14)), which is hardly consistent with petitioner's claim that the point source must itself somehow generate the pollutant.

No doubt that is why publicly owned treatment works (POTWs), which often do no more than filter out and pass through to navigable waters pollutants originating from nonpoint sources, are subject to regulation as point source discharges under the Clean Water Act. See 33 U.S.C. §§ 1311(a)-(b); see *e.g.*, *id.* § 1311(h) (referring "to the discharge of any pollutant from a publicly owned treatment works"). POTWs do not necessarily generate or otherwise create pollutants in the first instance; yet the Act treats them as point source dischargers subject to Section 402.[2]

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[2] EPA has promulgated programs for other comparable point source discharges that, like the discharges at issue in this case, originated in nonpoint source runoff. See, *e.g.*, *Combined Sewer Outfall Control*

Indeed, petitioner's notion of causation underlying its proffered definition of "from" would turn traditional notions of causation wholly on their head. See Sir Francis Bacon, The Elements of the Common Lawes of England, Reg. I (1630) ("*In jure non remota causa sed proxima spectatur.*"). The immediate, most proximate cause of an injury to receiving waters – in this case, petitioner's three pipes – would fall outside the scope of regulation. Instead only the original source of the phosphorous, far removed in time and space from the ultimate injurious actions deliberately taken by petitioner's three pipes in pumping massive amounts of contaminated water into the WCA-3A, would be considered the exclusive legal cause of the injury.

**B. EPA's Consistent Interpretation of the Clean Water Act And Its Congressional Amendment Confirm The Statute's Plain Meaning**

The statute's plain meaning is further confirmed by EPA's consistent administrative interpretation of the relevant provisions as well as by subsequent congressional amendment of the Act.

1. In 1973, just months after Congress passed the statute, EPA conducted a formal rulemaking in which it concluded that when rain runoff from agricultural and silvicultural activities ultimately reached pipes, ditches and channels, any effluent containing chemical contaminants conveyed by those pipes, ditches, and channels into navigable waters constituted point source "discharges of a pollutant," within the meaning of the Clean Water Act. See *Form and Guidelines Regarding Agricultural and Silvicultural Activities*, 38 Fed. Reg. 18000 (1973). As carefully explained by the EPA General Counsel in a formal opinion issued on August 3, 1973, discussing the legal status of runoff from farms and other activities that flows into pipes and ditches that convey that

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*Policy*, 59 Fed. Reg. 18688, 18689 (1994) ("CSOs are point sources subject to NPDES permit requirements.").



effluent into navigable waters, "there is little doubt that conveyances meeting the definitional requirements of § 502(14) are point sources; whether such conveyances appear on farms or elsewhere. Accordingly, it is not legally tenable to treat farm discharges as nonpoint sources." EPA General Counsel Opinion (August 3, 1973), *Authority to Exclude Point Sources from the Permit Program, reprinted in* U.S. EPA General Counsel Opinions (Envt'l Law Pub. Serv. 1979). Hence, as early as 1973, EPA squarely rejected petitioner's claim that the pollutants must originate in the point sources themselves rather than, as the statute expressly provides, be simply the "conveyance" of pollutants that reached waters prior to the point sources.[3]

EPA's current regulatory definition of "discharge of a pollutant" is to the same effect. It defines the term as including "additions of pollutants into waters of the United States: from surface runoff collected or channeled by man * * *." 40 C.F.R. § 122.2. Of course, such a "chanel[ling]" of runoff is precisely what petitioner claims, notwithstanding EPA's regulation, is not a discharge even when deliberately pumped into a navigable water body.[4]

2. Formal actions taken by Congress since 1972 likewise

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[3] To be sure, in this same rulemaking, EPA construed the Clean Water Act as allowing the Agency to exempt by regulation certain kinds of point source discharges from the permit requirement as a matter of administrative agency discretion, but *not* on the ground that the point sources did not plainly constitute "discharges." However, the D.C. Circuit, in *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) ruled that "the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402."

[4] No doubt that is why the Florida Department of Environmental Protection apparently treats as point source discharges subject to Section 402 analogous activities of petitioner that manage nutrients contained in stormwater. See note 11, *infra*.

make clear that Congress shares EPA's view of the plain meaning of point source discharges regulated by Section 402. Soon after EPA declared its view of the meaning of point source and the D.C. Circuit ruled that EPA must regulate all such sources pursuant to Section 402 (NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977)), Congress enacted a specific amendment to the definition of point source to exclude irrigation return flows. See 33 U.S.C. § 1362(14). By narrowly singling out for statutory exemption just this one category out of many runoff-related point sources covered by EPA's interpretation and the D.C. Circuit's ruling, Congress essentially acquiesced in the inclusion of those other sources as discharges subject to Section 402.

Congress's similar decision in 1987 to exempt from Section 402 permit requirements certain other "stormwater runoff," particularly that resulting from "oil, gas, and mining operations" (33 U.S.C. § 1342(l)(2)) provides even further support for our view that Congress in no manner embraced petitioner's understanding of a point source. See Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 65-66 (1987). Congress expressly defined the exempted category as "discharges of stormwater runoff [specific mining and oil and gas operations] composed entirely of flows which are from conveyances * * * used for collecting and conveying precipitation runoff and which are not contaminated by contact with *** any overburden, raw material, intermediate products, finished products, byproduct, or waste products located on the site of such operations." *Id.* Of course, if petitioner were correct about its interpretation of the meaning of "discharge of a pollutant" any such statutory exemption would have been wholly unnecessary; such point source conveyances of runoff wherein the point source did not itself create the pollutants would already be exempt.

3. Finally, there is no merit in petitioner's contention that this Court should read Sections 101(g) and 304(f) as implicitly amending the Clean Water Act's express definition



provisions so as to create an exemption for all "movement" of water that States may otherwise regulate. Neither of these statutory "mouseholes" could remotely sustain the "elephant" petitioner finds in them. Whitman v. American Trucking Ass'n, 531 U.S. at 468.

Section 101(g) simply declares general congressional policy not to impair State water allocation authority. It does not purport to modify the Act's plain meaning or create a "water movement" exception to point source discharges. As this Court explained in *Public Utility Dist. No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 720 (1994), "Section[] 101(g) preserve[s] the authority of each State to allocate water quantity as between users; [it] do[es] not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."

In all events, "the authority of each State to allocate quantities of water within its jurisdiction" is not called into question by the decision below. See 33 U.S.C. § 1251(g). Petitioner here is not just engaging in water allocation. It is discharging pollutants through point sources into navigable bodies of water. Were Section 101(g) read, as petitioner suggests, to exempt from Clean Water Act jurisdiction all discharges of pollutants that result from conveyances of water, Section 301's ban on discharges of pollutants in the absence of a permit would be quickly rendered a legal nullity. Hardly a point source discharge occurs in the absence of water being utilized as the transporting medium.

Section 304(f)(2) is likewise beside the point. To be sure, Section 304(f)(2)(F) instructs the EPA Administrator to issue information to Section 208 planning agencies "information including *** processes, procedures, and methods to control pollution resulting from *** changes in the movement, flow, or circulation of any navigable waters *** including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." But it has been settled law for decades that not every one of those activities

described in Section 304(f)(2) pertains exclusively to nonpoint sources and that many of those same activities, which extend to runoff from agricultural, silvicultural, mining, and construction, are sometimes point sources and sometimes nonpoint sources. Both the federal courts of appeals and EPA have long expressed that view.[5]

In any event, this is not a case where the court below ruled (or where we contend) that water quality problems caused by mere "movement, flow, or circulation" or navigable waters are subject to NPDES permits. It is only point source conveyances of waters that contain *pollutants* to receiving navigable waters that fall within the scope of Section 402 .

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In short, wholly missing from the 30-year history of the Clea.. Water Act's administration by EPA and its revision by Congress is even a scintilla of support for petitioner's strained reading of the statute, which they nonetheless presumably advance as the Act's plain meaning. Instead, the actions of both EPA and Congress are entirely in harmony with the plain meaning embraced by the court of appeals below, which we urge this Court to uphold.

**C. Petitioner's Reading Threatens Well Established And Important Clean Water Act Programs**

1. Indeed, because EPA's settled administrative interpretation is inconsistent with petitioner's position, were this Court to embrace petitioner's reading of the jurisdictional scope of Section 402, such a ruling would call

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[5] See U.S. v. Earth Sciences, Inc. 599 F.2d 368, 372 (10th Cir. 1979) ; Sierra Club v. Abston Construction Co. 620 F.2d 41, 44 (5th Cir. 1980); NRDC v. Costle, 568 F.2d at 1377; EPA General Counsel Opinion (August 3, 1973), *Authority to Exclude Point Sources from the Permit Program* ("To be sure, sections 208(b)(2)(F) and 304(e) indicate that Congress thought that some agricultural runoff would not be a point source. However, these sections cannot be read to mean that pipes, ditches, etc., are not point sources when they occur on farms.").



into question the legality of a vast number of longstanding and important Clean Water Act programs. Point source regulation of stormwater discharges, combined sewer outfalls, and runoff from mining, construction, and agricultural activities that flow into discrete point sources would all potentially fall outside the scope of Section 402.

Decades of federal court of appeals rulings upholding the applicability of Section 402 to a wide variety of point source discharges would likewise be upset. Courts long ago ruled that point source discharges subject to Section 402 include contaminated runoff from mining processes that flow through ditches into navigable waters (Sierra Club v. Abston Construction Co., 620 F.2d 41 (5th Cir. 1980); U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979)) and stormwater runoff discharged by sewer systems directly into navigable waters (Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 592 (D.C. Cir. 1980)). Appellate courts have uniformly ruled that NPDES permit requirements are not precluded simply because the pollutants first entered water prior to being conveyed by a discrete conveyance, such as a pipe, into a distinct navigable water body.[6]

Finally, Section 402 enforcement would be seriously hampered. Whether a point source exists would turn on facts far removed from the immediate characteristics of the conveyance and the receiving waters. The distant origins of the pollutants and intake waters would require discovery.

2. Nor would the resulting environmental impact of removing all these point source discharges from Section 402 permit requirements be negligible. It is well established

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[6] See, *e.g.*, Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001); Dubois v. U.S. Dept. of Agric., 102 F.3d 1273, 1299 (1st Cir. 1996); Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 308-09 (9th Cir. 1993); Dague v. City of Burlington, 935 F.2d 1343, 1354-5 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992) .

today that these kinds of point sources are the primary source of water quality degradation in many parts of the nation. The facts of this case underscore the significance of such point source discharges to water quality. Petitioner's three pipes are discharging massive amounts of phosphorous into a pristine body of water within the Everglades. As described by the Solicitor General in his brief filed in this case at the jurisdictional stage (Juris. Br. 3, *citing* Pet. App. 16a-17a), "[p]hosphorus levels are a defining element of the Everglades. In its natural state, the Everglades system * * * contains only limited amounts of phosphorus * * *. Adding phosphorus above natural levels causes an imbalance in the native flora and fauna and results in harmful growth."

**D. The Solicitor General's Alternative Interpretation Of the Clean Water Act Is Equally Flawed**

The Solicitor General correctly rejects (Merits Br. 13) petitioner's core argument "that pollutants can be added 'from' a point source only if the point source itself generates or is the originating source of the pollutants." Consistent with our view, the Solicitor General stresses (*id.* at 22 n.7) that petitioner's legal theory would be "inconsistent with the Clean Water Act's manifest aim to impose permitting requirements on facilities, such as publicly owned treatment works and municipal storm sewer systems, that do not themselves generate the pollutants in the water they treat, but do introduce those pollutants into the navigable waters."

In nonetheless urging reversal of the judgment below, the Solicitor General embraces a construction of Section 402 that is no more tethered than is petitioner's to the statute's plain meaning and EPA's settled administrative implementation. He argues (Merits Br. 12) that Section 402 does not apply to facilities that "do no more than convey or connect navigable waters." Because "the S-9 pumping station transports 'waters of the United States' that already contain pollutants from one location to another; it does not add pollutants to 'the waters of the United States.'" *Id.* at 13. It "merely



transports navigable waters from one location to another." *Id.*

Although different from petitioner's argument, the Solicitor General's proposed construction would seriously undermine the Clean Water Act's ability to achieve its essential water protection goals. Adoption of his argument would not incidentally reduce the scope of Section 301's ban on point source discharges and the Section 402 permit program. The meaning of "navigable waters" in the Clean Water Act goes far beyond traditional navigable waters to extend at the very least to wetlands and nonnavigable tributaries, including ditches and channels, that can be far removed from traditional navigable waters. See U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); U.S. v. Deaton, 332 F.3d 698 (4th Cir. 2003); 33 C.F.R. § 328.3. Under the Solicitor General's reading, all discharges between such waters would be exempted from Sections 301 and 402.

The Solicitor General's most obvious legal error lies in his repetition of petitioner's own: the erroneous assumption that whether a point source discharge exists turns on the origins of the input into the point source rather than exclusively on the nature of the point source's output. As shown above (p. 6-7, *supra*), the statutory definition of "discharge of a pollutant" clearly focuses exclusively on the latter. There is absolutely nothing within the plain meaning of Section 502(12)'s definition of "discharge of a pollutant" to suggest that it is legally relevant whether the waters in which those pollutants are being conveyed were previously "navigable."

The Solicitor General tries mightily to suggest otherwise, but only by way of rhetorical subterfuge that is unavailing. First, he tries to recharacterize what is indisputably a point source that is actively "conveying" high concentrations of pollutants into a navigable water body into a mere passive "connect[ion]" between two bodies of navigable waters. Petitioner's three pipes, however, are no mere passive connection. They are a "conveyance," which, unlike "connection" is a precise statutory term of art. To the

Solicitor General, it may be a "mere" conveyance (Br. 16), but for the drafters of the Water Act, the act of "conveyance" is what makes petitioner's pipes a point source discharge.

Second, the Solicitor General repeatedly refers (Br. 13) to petitioner's pipes as conveying "navigable waters" or, using the statutory definition of that term of art, "waters of the United States." See 33 U.S.C. § 1362(7). It is entirely misleading, however, to say that petitioner's pipes are conveying "navigable waters" because that characterization presumes the legal relevance of the fact that the waters contained in the pipe were once present in a navigable water body. The pipes do not convey "navigable waters." What they convey is "water." And, just as with any other point source, when the water being conveyed contains pollutants that are being directly added to a navigable water body in which the pollutants did not previously exist, such a conveyance is a point source discharge.

To be sure, it can be relevant whether the receiving waters are the *same* water body from which the point source originally withdrew water. But that is not because the navigability of those originating waters is relevant, but only because a discharge back into the same water body would raise a question whether an "addition" of pollutants was in fact occurring. If the discharge was doing no more than simply reintroducing pollutants that had previously been in the receiving waters, it might well be that an "addition" was not occurring.

Even if, however, there were any statutory ambiguity (which there is not), the Solicitor General's views would not be entitled to heightened judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA is the only federal agency possibly entitled to *Chevron* deference in the construction of the Water Act terms at issue here and, in an authoritative interpretation, the EPA General Counsel has specifically and unambiguously rejected the views presented by the Solicitor General.



Prior to Congress's decision in 1977 to exclude irrigation return flows from the scope of point source regulation, EPA was faced with the question whether such flows amounted to a point source. The EPA General Counsel answered that question in a formal decision issued on June 27, 1975, after providing opposing parties with an opportunity to brief the legal issue. See *In Re Riverside Irrigation District, Ltd and 17 Others*, Decision of the General Counsel No. 21 (June 27, 1975), *reprinted in* U.S. EPA General Counsel Opinions (Envt'l Law Pub. Serv. 1979). Not surprisingly, the General Counsel concluded that irrigation return flows clearly amounted to point sources under the statute's plain meaning, specifically rejecting each legal argument raised by petitioner here.[7]

But what is most striking about the EPA General Counsel's 1975 formal ruling is that he specifically *rejects* the very same construction of the Clean Water Act that the Solicitor General sets forth in his amicus brief in this case. One of the arguments raised in the 1975 proceeding by those claiming that the Section 402 permit requirement did not apply to irrigation return flows into navigable waters was that the irrigation ditch could itself be considered a navigable water and therefore it could not be deemed to be adding pollutants even when discharging to another navigable water. That is of course precisely what the Solicitor General is arguing before this Court.

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[7] The General Counsel found that "irrigation activity" resulting in pollutants being discharged into navigable waters from a discrete conveyance is subject to Section 402 and he rejected the argument, repeated here, that contaminants once in water are no longer "pollutants," but instead "pollution." *In Re Riverside Irrigation District, supra.* Of course, Congress in 1977 subsequently decided expressly to exempt irrigation return flows from the definition of "point source" (see 33 U.S.C. § 1362(14)), but that exclusion does not undermine the correctness of the General Counsel's interpretation of the statutory language as it continues to apply to all other types of point sources after 1977. Quite the opposite. See page 8-9 & n.3, *supra.*

The EPA General Counsel, however, squarely rejected that contention. He found that "to define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary." *In Re Riverside Irrigation District, supra.* The General Counsel stressed, with emphasis in his original opinion, "what is prohibited by section 301 is '*any addition* of *any pollutant* to navigable waters from any point source." *Id.* And, finally, removing any possible doubt as to his intent that there is absolutely no merit to the Solicitor General's position in this case, the EPA General Counsel closed as follows:

> It is therefore my opinion that, *even should the finder of fact determine that any given irrigation ditch is a navigable water, it would still be permittable as a point source where it discharges into another navigable water body,* provided that the other point source criteria are also present.

*Id.* (emphasis in original and emphasis added).

Perhaps the stark disparity between the General Counsel's longstanding views and those expressed by the Solicitor General in this case is why the names of no EPA attorneys appear on the Solicitor General's brief expressing the views of the "United States" on the meaning of a statute administered by EPA. But whatever the reasons for that striking absence, only the views of the EPA General Counsel in a formal decision, rather than those expressed in a Solicitor General brief, could be entitled to *Chevron* deference.

The EPA General Counsel's 1975 decision was, moreover, the product of defined administrative agency procedures that allowed important legal issues to be certified to the General Counsel for careful consideration and resolution. In contrast to a brief filed in the course of litigation, such as that submitted by the Solicitor General in this case, the General Counsel's ruling is precisely the kind of exercise of



legislatively delegated lawmaking authority (see 33 U.S.C. § 1342(a)(1)) that has the "force of law" for which *Chevron* deference applies in the event of statutory ambiguity. United States v. Mead Corp., 533 U.S. 218, 231, 234 (2001).[8]

**II. Petitioner's Reliance On "Principles of Statutory Interpretation" To Defeat The Clean Water Act's Plain Meaning Is Misplaced**

Although petitioner purports to acknowledge (Br. 26) that "[t]he starting point for interpretation is the language of the statute itself," it is well past the mid-point of its brief before petitioner even attempts to discuss the relevant language. Then, spending little more than four pages of its 49-page submission on that language, petitioner ultimately seeks refuge not in its plain meaning, but in a series of so-called "ordinary principles of statutory interpretation" (Br. 34). Petitioner claims (1) federalism concerns demand a "clear statement" to support "stripping the States of their traditional powers"; (2) the "rule of lenity" requires a narrow construction to avoid unfair criminal prosecutions; and (3) plain meaning should be ignored when it would "lead to absurd and disastrous results."

Petitioner's argument fails for two fundamental reasons. First, none of these "principles of statutory interpretation" can overcome the overriding principle that the judicial inquiry ends when the meaning of a statute is plain. And, second, none of the varied policy concerns petitioner raises in support of the application of these purported "principles" would in fact be implicated by subjecting petitioner's point sources to Section 402 permitting requirements.

**A. The Plain Meaning Of A Statute Is Controlling**

Petitioner commits a basic error in positing that this Court

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[8] Indeed, it is the position of the EPA *and the Solicitor General* that, under this Court's precedent, *Chevron* deference to EPA is warranted in just these kinds of permit adjudications. See Brief for EPA, Alaska v. EPA, No. 02-658, p. 41.

should turn to petitioner's proposed "principles of statutory interpretation" and on that basis rule that Section 402 does not apply to its conveyance of polluted effluent into navigable waters. None of those principles applies where, as in this case, the statute possesses a plain meaning as applied to the factual circumstances of the case.

Accordingly, in *Salinas v. United States*, 522 U.S. 52 (1997), this Court explained that the "clear statement" rule, under which Congress "will not be deemed to have significantly changed the federal-state balance" absent such a statement, has no continuing force when the statute is unambiguous. "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Id.* at 59. Petitioner's reliance on the rule of lenity is equally misguided. "[T]he rule of lenity applies only when an ambiguity is present; 'it is not used to beget one * * *. The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994), *quoting*, U.S. v. Turkette, 452 U.S. 576, 587-88 n.10 (1981).

Moreover, "[b]road general language is not necessarily ambiguous when congressional objectives require broad terms." Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980). "'[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001), *quoting* Pennsylvania Dept. of Corrections v. Yesky, 524 U.S. 206, 212 (1998).

The Clean Water Act's breadth is no mere happenstance. As described by this Court, the Clean Water Act "constituted a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" U.S. v. Riverside Bayview Homes, 474 U.S.



121, 132 (1985). "This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality * * * Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132-33, *quoting* S. Rep. No. 92-414, 92nd Cong., 2d Sess. 77 (1972). Petitioner's suggested exception, therefore, would directly undermine congressional intent by eroding the comprehensiveness of the single most effective aspect of the statute: the Section 402 permit program.

### B. Application of the Clean Water Act According To Its Plain Terms Neither Raises Serious Federalism Concerns Nor Otherwise Leads To Any Absurd Or Disastrous Consequences

Petitioner and their supporting amici are also wrong in suggesting that this Court should ignore the Clean Water Act's plain meaning because none of the various policy concerns they raise is in fact implicated by the decision below. Affirmance of the lower court's judgment will not transgress state sovereignty and it will not impose massive burdens, if any, on water allocation systems.

#### 1. The Clean Water Act, Including Section 402, Directly Incorporates Rather Than Transgresses State Sovereign Prerogatives

Petitioner's heavy emphasis on principles of federalism at the expense of the relevant statutory language starts from the false premise that the Clean Water Act is administered exclusively by the federal government to the persistent subjugation of the States. As this Court has previously explained, however, the Clean Water Act establishes a "regulatory 'partnership'" between the federal government and the States. See International Paper Co. v. Ouellette, 479 U.S. 481, 490 (1987). In myriad ways, the Act recognizes the important role that States should and do play in water pollution control.

Indeed, the major role played by the States extends to virtually all aspects of the Section 402 permit program, especially as that program relates to the kind of point source discharges present in this case. First, as described by this Court in *International Paper Co. v. Ouellette*, 479 U.S. at 489, "[t]he Act provides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U. S. C. § 1342(b)." Currently, 47 out of the 50 States are doing just that: they are the primary permitting agencies pursuant to Section 402(b).[9] Because Florida is just such a state, were this Court to affirm the judgment below, it would not be EPA that would be primarily responsible for deciding the content of petitioner's Section 402 permit. It would be a fellow Florida state agency. See note 11, *infra*.

Nor are State permitting agencies mere instrumentalities of the federal government. They exercise considerable independent lawmaking authority. The kinds of point source discharges at issue in this case are, moreover, not within the narrower category of industrial point sources for which Congress asked the Administrator to promulgate nationally uniform technologically-based effluent limitations. See 33 U.S.C. §§ 1311(b), 1314(b); E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112 (1977); EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980). Accordingly, for a source like petitioner's, it would be the responsibility of the State permitting agency to use its "best professional judgment" to craft appropriate permit requirements. See 33 U.S.C. § 1342(a); 40 C.F.R. § 122.44(a).

The other statutory basis for effluent limitations within a

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[9] See National Pollutant Discharge Elimination System, Website of U.S. EPA, http://cfpub.epa.gov/npdes/statestats.cfm (accessed October 27, 2003).



Section 402 permit is even more within the discretionary authority of the States. The effluent limitations imposed by Section 402 permits must also guard against violation of State water quality standards. See 33 U.S.C. §§ 1311(b)(1)(C), 1313(a) & (d). But, as the Clean Water Act makes clear, it is *State* water quality standards that govern this federal requirement. The States possess the primary responsibility for determining state water quality standards and, where the State agency is the permitting authority, to determine how to allocate effluent between several sources to ensure that state standards are met. See 33 U.S.C. § 1313(a)-(d); 33 U.S.C. § 1313(c); Public Utility Dist. No. 1 v. Washington Dept. of Ecology, 511 U.S. 700 (1994). Unlike for the Clean Air Act, 42 U.S.C. § 7409, there are no generally applicable nationally uniform ambient standards applicable to all waters.

**2. Subjecting Petitioner's Pumping Station to Section 402 Would Not Lead To Massive Administrative Burdens On State Authorities**

While studiously avoiding its origins within this Court's precedent, petitioner and its amici ultimately turn to the last refuge of those seeking to persuade the Court to ignore the clear statutory language in favor of a construction that petitioner contends would lead to a more sensible policy: the "absurd result" canon most famously set forth in *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892). See The Honorable Antonin Scalia, A Matter of Interpretation, 18 (1997). Petitioner, joined by its amici, accordingly unleash their own veritable floodgates of horrible results, prophesizing an administrative cataclysm or bureaucratic doomsday should the Court affirm the judgment below.

It should be sufficient, of course, simply to restate the obvious: the plain meaning of the statute must prevail, especially where, as with the Clean Water Act, Congress so carefully defined the relevant terms and otherwise made plain in a host of provisions throughout the Act its rejection of petitioner's preferred policies. But, it is important

nonetheless to make clear that petitioner's exaggerated rhetoric is only that: exaggerated rhetoric.

At the outset, the vast majority of water allocation management consists simply of diverting water *away* from a body of water. Although such withdrawals of water clearly have water quality impacts, there is no question that withdrawals do not constitute "discharges" and they are accordingly not subject to Section 402 notwithstanding those impacts. So too, Congress has already decided specifically to exempt from Section 402 permitting requirements the single largest source of pollution from water allocation activities that would otherwise satisfy the statute's definition of "discharge," which is irrigation return flows. See 42 U.S.C. §§ 1342(l)(1), 1362(14).

Nor is there reason to suppose that all water allocation activities that divert water from one basin to another will be subject to NPDES permit requirements. To the extent that the waters involved, unlike those here, can be fairly treated as the same waters, we do not herein dispute that EPA could fairly conclude, as it has done for dams, that no "addition" is occurring within the meaning of Section 502(12).[10] For

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[10] At the jurisdictional stage in this case, the Solicitor General heavily relied (Juris. Br. 11) on the viability of the distinction historically made by the federal courts of appeals between "two situations": (1) "when a water control facility, such as a dam or pump, directs the flow of water from one part of a single water system to another part of the same system," which "does not result in an 'addition' of a 'pollutant,' and (2) "when a water control facility transfers polluted water from one distinct and separate body of water to another less-polluted body of water," which does "result[] in an 'addition' of pollutants to the more pristine body of water, and an NPDES permit is therefore required." Whatever the reasons for the Solicitor General's dramatic shift of opinion between the brief filed at the jurisdictional stage last May and the brief submitted on the merits just a few weeks later in September, we believe he got it right the first time on the viability of the distinction.



many dams, there may be merely "water that passes through," warranting the conclusion that the receiving waters are the same as the intake waters. See U.S. Merits Br. 24 n.10. But the Solicitor General is simply wrong in equating (*id.*) that activity of dams with the operation of the pumps at issue here. Petitioner's pipes do not simply allow water to "pass through." They take massive amounts of contaminated water and deliberately discharge them for the purpose of disposal into a distinct navigable water body to which they would not otherwise have flowed.

We are likewise confident that EPA possesses considerable discretion in interpreting the meaning of "discharge of a pollutant" as applied to water allocation activities, unlike those present here, that are truly aimed at allocating water supplies to satisfy human consumptive needs. Such classic transbasin diversions invariably involve moving pristine water to join waters that are not so pristine, not vice versa. For such activities that are in fact doing no more than moving water, there may well be ambiguity in terms of the application of Section 402 and, for that reason, EPA may well possess some discretion under *Chevron* to advance a reasonable construction of the Act that exempts some of those water allocation activities.

But the theoretical possibility of some ambiguity in the application of the statute in other factual circumstances lends absolutely no support to petitioner's claim that either the Act's plain meaning exempts petitioner from Section 402 or there is sufficient ambiguity to support an sweeping administrative exemption for all "water movement." Petitioner is not moving water for human consumptive purposes. Petitioner is not moving pristine water to a less pristine area. Nor is petitioner simply moving water within the same navigable body of water. Petitioner is discharging massive amounts of water from one area to get rid of it and is using a distinct water body as nothing more than a disposal site for its discharges of water and phosphorous.

This is nothing less than a classic Section 402 discharge.

Nor are petitioner and their amici correct in their assertion that subjecting similar discharges to Section 402 will impose massive administrative burdens on state and local water management activities. As described by the amicus brief filed by the Solicitor General at the Court's invitation at the jurisdictional stage (Juris. Br. 11), every court of appeals to address the status of such water transfers had previously reached precisely the same result as did the Eleventh Circuit below. The upshot of those longstanding judicial rulings has not been the widespread havoc now predicted by petitioner.

The reasons are several. As explained by the Solicitor General in his initial filing in this case, the considerable flexibility offered within the Clean Water Act would likely render "relatively modest" any possible resulting administrative burden even as applied to this case:

> For example, the permitting authority in this case--the Florida Department of Environmental Protection--may be able to issue a general permit that considerably streamlines the permitting process. See 40 C.F.R. 122.28, 123.25. Furthermore, an NPDES permit can provide considerable flexibility in any schedules for compliance. See 40 C.F.R. 122.47. And it appears at least questionable that the NPDES permit would subject petitioner to any significant environmental obligations beyond those that petitioner already faces under other existing laws.

U.S. Juris. Br. 17 (jurisdictional stage).

Hence, even under the most far reaching interpretation of "discharge of a pollutant," State permitting agencies would not have to issue hundreds of thousands of individual permits for water allocation activities for the same reason that they already do not have to do so for many other comparable activities regulated by Section 402. As long ago



described by the D.C. Circuit in *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), and as since routinely performed by both EPA and State permitting agencies pursuant to Section 402, the agency can instead issue, within reasonable bounds, general or areawide permits that authorize an entire category of activities. See, *e.g.*, *Final National Pollutant Discharge Elimination System General Permit for Storm Water Discharges from Construction Activities*, 68 Fed. Reg. 39087 (2003).

For similar reasons, petitioner's claim (Br. 40-42) that application of Section 402 to its pumping station will disrupt otherwise comprehensive state water management programs applicable to the Florida Everglades is a complete red herring. If such laws do in fact exist and adequately address the issue, then as the Solicitor General explained at the jurisdictional stage, Section 402 will not impose any additional significant burdens and will instead simply easily integrate itself into state programs as necessary to ensure protection of water quality based on state water quality standards. Indeed, as described by respondents in their brief (see Resp. Miccosukee Tribe Br. IIIA) and as revealed by publicly available documents,[11] it appears that petitioner is already subject to and complies with Clean Water Act Section 402 and 404 permits in many of its water management activities, including some closely related to those at issue in this case. There is, accordingly, no stark divide between Everglades management and the Clean Water Act.

But, of course, because petitioner is advancing a sweeping

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[11] See *e.g.*, Website of the South Florida Water Managment District, http://www.sfwmd.gov/org/wrp/wrp_evg/projects/404permit (Nov. 7, 2003) (describing Section 404 permit); Website of the Florida Dept. of Envt'l Protection, http://www.dep.state.fl.us/legal/legal documents/finalorders/1999/DEP99-0385.doc (Nov. 7, 2003) (Florida DEP final emergency order describing Section 402 permits applicable to Everglades nutrient removal project undertaken pursuant to stormwater treatment and Everglades Construction Project).

interpretation of the statute that would apply nationwide in all circumstances, the precise adequacy of Florida's other programs is wholly irrelevant. For, if petitioner is correct that Section 402 does not apply to its kind of water discharge activity, that would be equally true in jurisdictions that have *absolutely no* other programs at all apart from their administration of Section 402.[12]

In sum, the Clean Water Act does not impose some sweeping exemption for all pollutants conveyed by the movement of water no matter what the nature and impact of that movement. The Act instead provides sufficient clarity within its terms to identify discharges that, like petitioner's, are no different in their character from a classic industrial discharge, while maintaining sufficient flexibility within its requirements to guard against imposing unduly burdensome administrative requirements on state water management agencies for all their authorized activities.

## III. Petitioner's Sole Recourse Is To Persuade Congress Of The Merits Of Their Policy Arguments

Given the plain meaning of the Clean Water Act, as bolstered by its structure, longstanding administrative

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[12] Significantly, the experience of other States has demonstrated the potentially substantial value of subjecting some water transfers to Section 402. For instance, in *Del-Aware Unlimited, Inc. v. Pennsylvania*, 1984 Envtl' Hearing Bd. 178 (1984), the Pennsylvania Environmental Hearing Board considered whether a Section 402 permit was required for a state water project that would convey substantial amounts of water from the Delaware River to a distinct navigable body of water that the Delaware River would not otherwise reach. The Board ruled that Section 402 should apply because otherwise the State Department of Environmental Resources "would have no right to establish pollutant concentration limits for discharges of the Delaware into the Neshaminy or Perkiomen, no matter how polluted the Delaware or how pristine the receiving streams; we do not believe this outcome would be consistent with Congress' intent when it passed the Federal Clean Water Act." *Id.*



interpretation, and subsequent congressional amendment, petitioner's request for relief can be fairly characterized as an invitation for judicial amendment of a statute. The Court should soundly decline the invitation.

It is well established that this Court is "without competence to entertain these arguments – either to brush them aside as fantasies generated by fear of the unknown, or to act on them." Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980). Resolution of such policy disputes "involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on [the Court] should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts." *Id.* "[C]ourts 'are not at liberty to create an exception where Congress has declined to do so.'" Freytag v. C.I.R., 501 U.S. 868, 874 (1991), *quoting* Hallstrom v. Tillamook County, 493 U.S. 20, 27 (1989).

Certainly, based on the identity of the amici filing in support of petitioner, there is no reason to suppose that those supporting petitioner's preferred policy will be unable to have their voices heard by Congress should the Court affirm the judgment below based on the Clean Water Act's plain meaning. As previously described, we do not believe that there is any plausible basis for believing that affirmance will have any major adverse impact on water management nationwide, and will instead simply bolster water pollution control in those instances where regulatory gaps apparently persist. Certainly, the fact that no such massive burden has developed over the years in the face of multiple courts of appeals reaching the same result as the court below in this case, is weighty testimony in favor of our view.

But even if, contrary to our submission, problems do arise, these same entities can make their case heard by their elected representatives. Congress has certainly not exhibited any past reluctance to narrow the Clean Water Act when

persuaded that it would be sound public policy. Congress, accordingly, has exempted from Section 402 irrigation return flows and stormwater runoff from oil, gas, and mining activities. See 33 U.S.C. §§ 1342(l), 1362(14). The legislators have similarly fine-tuned the application of Section 402 to municipal and industrial stormwater discharges. See *id.* § 1342(p). Indeed, the Act is replete with statutory revisions made by Congress based on the lessons learned from the Act's actual implementation, rather than on a litigant's exaggerated rhetoric and hypothetical parades of horribles.[13]

No constitutional shortcut exists for achieving legislative change. Individual citizens and the politically powerless must follow the constitutional pathways for securing law reform, no matter how high the hurdles. These same rules must equally apply to captains of industry and to powerful state and local executive branch governmental entities.

## CONCLUSION

For the forgoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2003

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[13] See, *e.g.*, 33 U.S.C. §§ 1311(g) (modification provisions for certain nonconventional pollutants), 1311(h) (modification provisions for secondary treatment), 1311(i) (municipal time extensions).

## APPENDIX

### Description of Amici Curiae

**Carol M. Browner** was appointed by President William Jefferson Clinton, Administrator of the United States Environmental Protection Agency and unanimously confirmed by the United States Senate in January, 1993. She served in the position for eight years, longer than other EPA Administrator. Ms. Browner also worked closely with the White House to secure passage of the first ever comprehensive law to protect the Everglades. Prior to her appointment to EPA, Ms. Browner served as Secretary of the Environment for the State of Florida.

**Jonathan Z. Cannon** served as General Counsel of the United States Environmental Protection Agency from 1995 to 1998 and as Assistant Administrator for Administration and Resource Management for the Agency from 1993 to 1995.

**Charles Fox** served as Assistant Administrator for Water of the United States Environmental Protection Agency from July 1998 through January 2001. He also served as Secretary of the Maryland Department of Natural Resources from August 2001 through January 2003.

**Jean C. Nelson** served as General Counsel of the United States Environmental Protection Agency from 1993 to 1995.

**Robert W. Perciaepe** served as Assistant Administrator for Water of the United States Environmental Protection Agency from 1993 to 1998. He served as Assistant Administrator for Air and Radiation from 1998 to 2001.

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In The

# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICI CURIAE* FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, AND AUDUBON SOCIETY OF THE EVERGLADES IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether a pump's discharge of water containing pollutants, where the pollutants do not originate from the pump itself, is exempt from point source Clean Water Act permitting when the polluted water is pumped from a drainage canal that is a jurisdictional water of the United States into a different water of the United States into which the pollutants would not be discharged but for the action of the pump.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| INTERESTS OF *AMICI CURIAE* | 1 |
| SUMMARY OF THE ARGUMENT | 4 |
| FACTUAL BACKGROUND | 5 |
| A. THE S-9 PUMPING STATION | 5 |
| B. THE RELATIONSHIP BETWEEN THE S-9 PUMPING STATION AND THE EVERGLADES | 7 |
| C. POLLUTANTS IN THE S-9 DISCHARGE TO THE EVERGLADES | 9 |
| D. THE COMPREHENSIVE EVERGLADES RESTORATION PROJECT | 12 |
| E. THE EVERGLADES FOREVER ACT PERMIT | 13 |
| ARGUMENT | 16 |
| I. THE DISTRICT'S OPERATION OF THE S-9 PUMPING STATION REQUIRES AN NPDES PERMIT BECAUSE IT ADDS GROUND WATER POLLUTANTS TO THE WATERS IT DISCHARGES INTO THE EVERGLADES | 16 |
| II. THE SOLICITOR GENERAL'S "UNITARY WATERS" THEORY CONTRADICTS THE EXPRESS TERMS OF SECTION 402 WHICH REQUIRES PERMITS FOR ANY DISCHARGE WHICH ADDS POLLUTANTS | 19 |
| A. The New Exemption from Section 402 of the Clean Water Act Sought by the District and the Solicitor General Cannot Be Reconciled With the Express Terms of the Act | 19 |




TABLE OF CONTENTS – Continued


| | Page |
|---|---|
| B. There Is No Exemption In the Clean Water Act Based on the Construction History of the Drainage Source | 21 |
| III. THE DISTRICT IS NOT ENTITLED TO AVOID THE SECTION 402 PERMITTING REQUIREMENT BY CLAIMING THAT DISPOSAL OF GROUND WATER SEEPAGE AND STORM WATER CONSTITUES AN ALLOCATION WITHIN THE MEANING OF SECTION 101(g) | 23 |
| CONCLUSION | 25 |

## TABLE OF AUTHORITIES

Page

CASES

FEDERAL

*Kaiser Aetna v. United States*, 444 U.S. 164 (1979) ..... 22

*Miccosukee Tribe of Indians v. South Florida Water Management District*, 1999 U.S. District LEXIS 23306 (S.D. Fla. Sept. 30, 1999) ..... 6

*Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.2d 1364 (11th Cir. 2002) ..... 22

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STATE

*Florida Wildlife Federation, et al. v. Florida Department of Environmental Protection*, No. 03-3532RP (Fla. Div. Admin. Hearings filed Sept. 26, 2003) ..... 2

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STATUTES AND REGULATIONS

Clean Water Act, 33 U.S.C. § 1251(g) ..... 23

Clean Water Act, 33 U.S.C. § 1313(c)(1) ..... 23

Clean Water Act, 33 U.S.C. § 1313(c)(2) ..... 23

Clean Water Act, 33 U.S.C. § 1313(d) ..... 11, 20



## TABLE OF AUTHORITIES – Continued

Page

Clean Water Act, 33 U.S.C. § 1313(d)(2) ..... 11, 20

Clean Water Act, 33 U.S.C. § 1342(p) ..... 19

Clean Water Act, 33 U.S.C. § 1342(p)(1) ..... 19

Clean Water Act, 33 U.S.C. § 1342(p)(2) ..... 19, 20

Clean Water Act, 33 U.S.C. § 1342(p)(6) ..... 20

FEDERAL REGULATIONS

40 C.F.R. § 122.22(d) ..... 22

STATE STATUTES AND LAWS OF FLORIDA

Section 373.451(5), Florida Statutes ..... 15

Section 373.4592, Florida Statutes ..... 13, 14

Section 373.4592(2), Florida Statutes ..... 14

Section 373.4592(2)(j), Florida Statutes ..... 14

Section 373.4592(3), Florida Statutes ..... 14

Section 373.4592(9)(k), Florida Statutes ..... 13

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TABLE OF AUTHORITIES – Continued

Page

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL PROJECT COMPREHENSIVE REVIEW STUDY, FINAL INTEGRATED FEASIBILITY REPORT AND PROGRAMATIC ENVIRONMENTAL IMPACT STATEMENT, SUMMARY, vii-x (Apr. 1999), *available at* http://www.evergladesplan.org/docs/comp_plan_apr99/summary.pdf ..... 12

DEFINITION OF NGVD, *at* www.ems-i.com/wmshelp/General/Edit_Menu/Coordinate_Conversions/NGVD_system.htm (last visited Nov. 10, 2003) ..... 7

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, 303(d) LISTED WATER SEGMENTS IN BROWARD COUNTY, *available at* http://www.dep.state.fl.us/water/tmdl/docs/maps/broward.pdf (last visited Nov. 10, 2003) [Appendix 9, 19a] ..... 11, 12

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TABLE OF AUTHORITIES – Continued

Page

HERBERT J. FREIBERGER, U.S. GEOLOGICAL SURVEY, EFFECTS OF BACKPUMPING FROM SOUTH NEW RIVER CANAL AT PUMP STATION S-9 ON QUALITY OF WATER IN WATER CONSERVATION AREA 3, BROWARD COUNTY, FLORIDA 12, Open-File Rep. No. 73026 (1973) [Appendix 7, 14a-17a] ..... 8, 10, 17

MAP OF C-11 WEST BASIN AND CANAL IN CENTRAL BROWARD COUNTY, *at* http://www.sfwmd.gov/org/exo/broward/c11bmp/images/jpgs/c-11west.jpg [Appendix 5, 12a] ..... 8

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ECOLOGICAL IMPACTS OF DROUGHT IN THE WATER CONSERVATION AREAS (Apr. 13, 2001), *available at* http://www.sfwmd.gov/org/wrp/wrp_evg/reports/drought_0401/generalinfo.pdf [Appendix 4, 11a] ..... 7

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SOUTH FLORIDA WATER MANAGEMENT DISTRICT, EVERGLADES REGULATION: C-11 WEST, *at* http://www.sfwmd.gov/org/reg/esp/c11w.html (last visited Nov. 7, 2003) ..... 12, 13, 14

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, PUMPING STATIONS (1973) [Appendix 1, 1a-5a] ..... 6

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, TURF & LANDSCAPE BEST MANAGEMENT PRACTICES FOR THE C-11 WEST CANAL BASIN, *at* http://www.sfwmd.gov/org/exo/broward/c11bmp/execsum.html (last visted Nov. 10, 2003) [Appendix 6, 13a] ..... 9

TABLE OF AUTHORITIES – Continued

Page

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## INTERESTS OF *AMICI CURIAE*

The Florida Wildlife Federation, Environmental Confederation of Southwest Florida, and Audubon Society of the Everglades, as *amici curiae*, respectfully submit this brief in support of Respondents Miccosukee Tribe of Indians and Friends of the Everglades.[1]

The *Amici* are conservation organizations established for the purpose of protecting Florida's magnificent natural resources, including the Everglades National Park, a World Heritage site. The Clean Water Act permitting requirement upheld by the court below will serve to protect the Everglades and Lake Okeechobee, which are among the most ecologically important water bodies in the United States. The Everglades are already seriously impaired by pollution, and the exemption from Clean Water Act permitting sought by the petitioner South Florida Water Management District would further diminish protections for this unique ecosystem.

The Florida Wildlife Federation ("FWF") is a statewide non-profit conservation and education organization with over 12,500 members. FWF's mission includes the preservation, management, and improvement of Florida's water resources and its fish and wildlife habitat. Many of FWF's members reside within Lake Okeechobee's watershed and use the waters in the Lake and of the Everglades

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[1] The parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *Amici* or their representatives has made a monetary contribution to the preparation and submission of this brief.

for canoeing, air-boating, wildlife observation, photography, personal and commercial research, sport fishing, and waterfowl hunting. In particular, many FWF members fish, recreate and observe wildlife in the Everglades around the S-9 pumping station which is the subject of this appeal. FWF focuses much of its public education and advocacy efforts on the Everglades and Lake Okeechobee.

FWF recently obtained a Consent Decree that required the U.S. Environmental Protection Agency ("EPA") and, indirectly, the State of Florida, to comply with a 1972 Clean Water Act requirement to inventory and take corrective action on over 700 Florida water bodies which are polluted beyond legal standards. *Florida Wildlife Federation, et al. v. Carol M. Browner*, No. 4: 98CV356-WS (N.D. Fla. 1999). Both the federal and state governments had completely disregarded their responsibilities to take corrective action for over 25 years. Although a Consent Decree was entered in 1999, *id.* (Order of August 9, 1999), FWF has had to file yet another legal action to force the State of Florida to reduce polluted discharges down to levels that will allow the ecological survival of Lake Okeechobee. *Florida Wildlife Federation, et al. v. Florida Department of Environmental Protection*, No. 03-3532RP (Fla. Div. Admin. Hearings filed Sept. 26, 2003).

FWF has a pending Clean Water Act case against Petitioner South Florida Water Management District that is similar to the instant appeal. In that case, FWF is seeking to require the District to obtain Clean Water Act permits for its practice of force-pumping polluted drainage canal water into Lake Okeechobee. *See Florida Wildlife Federation v. South Florida Water Management District,* now consolidated under case No. 02-80309-CIV (S.D. Fla. filed July 30, 2002). The canals are at an elevation several feet lower than the surface of Lake Okeechobee and the



polluted canal water is disposed by pumping it up into the Lake. Although these drainage canals are waters of the United States, they have been officially designated by Florida and EPA as waters that fail to meet their classified use – fish and wildlife and swimming – because they are impaired by pollution beyond legal standards. Lake Okeechobee, which receives the discharge from these canals, is designated as a drinking water source – the most highly protected classification of use for water bodies in Florida. On July 1, 2003, FWF's case was stayed pending disposition of the instant appeal.

The Environmental Confederation of Southwest Florida ("ECOSWF") is a non-profit organization established for the purpose of protecting and preserving Florida's surface waters, ground water aquifers, wetlands, endangered and threatened species and their habitats, and other natural resources. Many of ECOSWF's members use and enjoy Lake Okeechobee and the Everglades for recreation, fishing, bird watching, photography, and educational purposes. In addition, ECOSWF has participated in numerous legal challenges aimed at preserving Florida's waters. For example, ECOSWF was a co-plaintiff with FWF and another conservation organization in a 1998 Clean Water Act enforcement case that resulted in the 1999 Consent Decree. For 25 years before that suit, the EPA and the State of Florida had utterly failed to comply with important obligations under the Clean Water Act.

Audubon Society of the Everglades ("ASE") is a non-profit conservation and education organization established in 1966 to promote the conservation of wildlife and the natural environment as well as an understanding of and interest in wildlife and the environment that supports it. ASE and its members conduct field trips and summer

conservation camps to give schoolchildren the opportunity to experience the ecology of Lake Okeechobee and the Everglades firsthand. Many of ASE's members also use the Everglades for bird watching and other recreational activities. For the last fifteen years, ASE has also been a participant in the litigation between the U.S. Department of Interior and Petitioner concerning excessive phosphorus pollution of the Everglades.

## SUMMARY OF THE ARGUMENT

The discharge of water from the S-9 pumping station is subject to Clean Water Act permitting requirements because the pumps are withdrawing pollutant-laden storm water and ground water from the South New River drainage canal and then discharging the polluted water into the Everglades. The operation of the S-9 pumping station introduces ground water into the drainage canal and then discharges the ground water into the Everglades. A discharge of ground water containing pollutants through a point source into a water of the United States requires an NPDES permit even if the pollutants are not introduced into the ground water by the discharger.

The "unitary waters" exemption posited by the Solicitor General and the District must be rejected as inconsistent with the Clean Water Act because: 1) any discharge of storm water that contributes to a violation of water pollution limits requires an NPDES permit regardless of the origin of the storm water; and 2) the Clean Water Act contains no express or implied principle that separate water bodies should be treated as a single water of the United States simply because they commingled a half



century ago. Adoption of the "unitary waters" theory would also defeat the purposes underlying the Clean Water Act requirement that states must designate uses and water quality specifications for each individual water body.

The sweeping character of the exemption sought by the District is revealed by the results of its application under the facts of this case. The S-9 pumping station would be allowed to continue to discharge canal water that is, in fact, contributing to a violation of water quality standards in the Everglades. The District would also be allowed to force-pump profoundly polluted drainage canal water up into Lake Okeechobee, a designated drinking water source.

The District claims that it should be exempt from Clean Water Act regulation because it is "allocating" water to the Everglades through the S-9 pumping station. That pump station does not function to allocate water but instead is a system that collects, conveys, and disposes of unwanted run-off and ground water seepage in order to provide drainage for developed lands.

## FACTUAL BACKGROUND

### A. THE S-9 PUMPING STATION

The S-9 pumping station is an industrial scale pumping station that conveys immense quantities of water into the Everglades. Attached as Appendix 1 is a description and photographs of the pumping station from a publication by Petitioner South Florida Water Management

District.[2] The scale of the water flow through South Florida Water Management District pumps is illustrated by the photographs on the fourth and fifth pages of Appendix 1 that graphically depict the size of the propellers and the diameter of the pipes. (App. 1, 4a-5a). Each of the three S-9 pumps discharges at the rate of 960 cubic feet per second ("cfs") for a total discharge of 2,880 cubic feet per second. U.S. ARMY CORPS OF ENGINEERS, INTERIM WATER CONTROL PLAN FOR PUMPING STATION 9A AND STRUCTURE 381, *available at* http://www.saj.usace.army.mil/projects/dwcp_c11.htm, § 7.02, ¶4 (May 2002) (App. 2, 7a) [hereinafter "INTERIM WATER CONTROL PLAN"].[3] The discharge rate of 2,880 cubic feet per second from the S-9 pumping station is considerably larger than the average flow of the upper Suwannee River and of many other important Florida rivers.[4]

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[2] SOUTH FLORIDA WATER MANAGEMENT DISTRICT, PUMPING STATIONS (1973) (App. 1).

[3] *See also, Miccosukee Tribe of Indians v. South Florida Water Management District*, 1999 U.S. District LEXIS 23306, at *4 n.5 (S.D. Fla. Sept. 30, 1999).

[4] *See e.g.*, U.S. GEOLOGICAL SURVEY, CALENDAR YEAR STREAMFLOW STATISTICS FOR FLORIDA, *at* http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02312000&agency_cd=USGS (Withlacoochee River); http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02326900&agency_cd=USGS (St. Marks River); http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02370000&agency_cd=USGS (Blackwater River); http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02235000&agency_cd=USGS (Wekiva River); http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02232400&agency_cd=USGS (St. Johns River); http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02359000&agency_cd=USGS (Chipola River); and http://nwis.waterdata.usgs.gov/fl/nwis/annual/?site_no=02231000&agency_cd=USGS (St. Marys River) (last visited Nov. 7, 2003).



## B. THE RELATIONSHIP BETWEEN THE S-9 PUMPING STATION AND THE EVERGLADES

The S-9 pumping station removes water from a portion of the former Everglades that is now a part of the western suburbs of Fort Lauderdale and discharges that water into the Everglades. Fifty years ago a levee was constructed on a portion of the Everglades in western Broward County. Construction of the levee and the accompanying S-9 pumping station allowed drainage of the area east of the levee, making the land available for agricultural and urban development. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, EVERGLADES INTERIM REPORT 2-11 (Jan. 1, 1999), *available at* http://www.sfwmd.gov/org/ema/everglades/interimrpt_98/chpt2.pdf (App. 3) [hereinafter "EVERGLADES INTERIM REPORT"]; *see also* Pet'r Br. at 8-9. The South New River Canal (the relevant portion is known as "C-11 West") runs through this area to the S-9 pumping station. On the west (receiving) side of S-9 are the Everglades.

The height of water in the Everglades is held at 9.5 feet to 10.5 feet[5] above sea level.[6] This is several feet

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[5] SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ECOLOGICAL IMPACTS OF DROUGHT IN THE WATER CONSERVATION AREAS at 2 (Apr. 13, 2001), *available at* http://www.sfwmd.gov/org/wrp/wrp_evg/reports/drought_0401/generalinfo.pdf (App. 4, 11a). Specifically, this part of the Everglades is designated "Water Conservation Area 3" ("WCA-3").

[6] Sea Level is now expressed as the National Geodetic Vertical Datum ("NGVD") which is a convention for establishing a standardized elevation for mean sea level. For that reason, all elevations in technical literature refer to elevations expressed in terms of NGVD. DEFINITION OF NGVD, *at* www.ems-i.com/wmshelp/General/Edit_Menu/Coordinate_Conversions/NGVD_system.htm (last visited Nov. 10, 2003).

higher than the elevation of the ground in the developed areas east of the levee.[7] HERBERT J. FREIBERGER, U.S. GEOLOGICAL SURVEY, EFFECTS OF BACKPUMPING FROM SOUTH NEW RIVER CANAL AT PUMP STATION S-9 ON QUALITY OF WATER IN WATER CONSERVATION AREA 3, BROWARD COUNTY, FLORIDA 12, Open-File Rep. No. 73026 (1973) (App. 7, 14a) [hereinafter FREIBERGER REPORT]. The much higher water level in the Everglades forces ground water through the ground under the levee because the soil and rock underlying the Everglades is porous. Ground water seepage is such a serious problem that a large auxiliary pump station next to S-9 is under construction and will be operated for the sole purpose of collecting ground water seepage in the canal east of the levee and discharging it to the Everglades (the pump station has been given number S-9A). *See* INTERIM WATER CONTROL PLAN at § 7.01 ("[t]he operation of S-9A is expected to be near continuous to match the seepage") (App. 2, 6a); *see also* Pet'r Br. at 11.

The canal and S-9 pumping station are also essential to disposing of urban storm water run-off that would otherwise accumulate in a relatively short time and cause floods. Br. of Amicus City of Weston at 4-6. Run-off from the suburban and agricultural lands east of the levee is collected in the South New River Canal and conveyed from that canal into the Everglades by the S-9 pumping station.[8] When the water level in the South New River Canal

[7] Studies have indicated that soil subsidence east of the levee has lowered the elevation of the land surface by almost four feet. EVERGLADES INTERIM REPORT 2-10, *available at* http://www.sfwmd.gov/org/ema/everglades/interimrpt_98/chpt2.pdf (last visited Nov. 7, 2003).

[8] MAP OF C-11 WEST BASIN AND CANAL IN CENTRAL BROWARD COUNTY, *at* http://www.sfwmd.gov/org/exo/broward/c11bmp/images/jpgs/

(Continued on following page)



rises to four feet NGVD, the S-9 pumps are turned on; they are turned back off when the canal water level falls to one foot NGVD. Pet'r Br. at 11. The pumps are also routinely operated in preparation for approaching storms. Br. of Amicus City of Weston at 6.

## C. POLLUTANTS IN THE S-9 DISCHARGE TO THE EVERGLADES

The area from which the South New River Canal (C-11 West) collects urban run-off is inhabited by 136,000 people. Pet'r Br. at 12. As explained on the South Florida Water Management District's web site, run-off collection canals capture and convey "urban fertilizers, detergents, household chemicals, gas, [and] oil. . . ." The same web site states that "[t]he C-11 West basin has been cited as one of the top urban polluters of the Everglades." SOUTH FLORIDA WATER MANAGEMENT DISTRICT, TURF & LANDSCAPE BEST MANAGEMENT PRACTICES FOR THE C-11 WEST CANAL BASIN, *at* http://www.sfwmd.gov/org/exo/broward/c11bmp/execsum.html ¶¶1, 3 (App. 6, 13a).

It has been well-known for at least thirty years that the S-9 pump withdraws ground water that is chemically different from that of the Everglades and discharges this ground water into the Everglades. A United States Geological Survey Report dated 1973 – conducted in cooperation with the District – found that ground water is a

c-11west.jpg. (App. 5, 12a). The map shows that the storm water run-off collection system includes the cities of Weston (which has filed an amicus brief in this case), Sunrise, Davie, Cooper City, and part of Pembroke Pines. The map states that floodwater from the cities and towns in this area is "pumped to the Everglades via the S-9 pump." *Id.*

"major contributor to the [South New River] canal." FREIBERGER REPORT at 20 (App. 7, 15a). This ground water pumped through S-9 is mineralized and has low levels of dissolved oxygen. *Id.* at 61 (App. 7, 17a) (dissolved oxygen levels in the South New River Canal on the intake side of the S-9 pump "were consistently low, presumably because of the great amount of groundwater inflow to the canal"). Dissolved oxygen is a critical constituent in lakes, rivers and wetlands because fish and other aquatic life need to breathe oxygen dissolved in the water in order to survive. FLORIDA OCEANOGRAPHIC SOCIETY, COMMON WATER QUALITY TESTS AND WHY THEY ARE IMPORTANT, DISSOLVED OXYGEN, *at* www.floridaoceanographic.org/parameters.htm (last visited Nov. 10, 2003). When the S-9 is in operation, dissolved oxygen levels in the adjacent Everglades (WCA-3) "immediately" decrease to about the same concentration of dissolved oxygen in the canal from which the S-9 withdraws water. FREIBERGER REPORT at 61 (App. 7, 17a). S-9 does not merely discharge run-off: it adds pollutants to the canal water by pulling ground water up into the canal and then discharges the canal's contents into the Everglades. *Id.* at 14 (App. 7, 14-15a).

Neither the ground water nor the run-off collected in the canal would naturally flow into the Everglades because the water in the Everglades is higher than the urban and agricultural land to the east of the levee. For this reason, the waters of the Everglades and of the South New River Canal "intermingle" only to the extent that the S-9 pumping station forces canal water *up* and into the Everglades.

The water discharged through S-9 into the Everglades is categorized by the EPA and the State of Florida as impaired by pollution. Clean Water Act section 303(d)



requires states to file with the EPA reports that identify water bodies within the state that are so polluted that they fail to meet established water quality standards. 33 U.S.C. § 1313(d). The EPA then approves (or modifies) the list of "impaired" waters. 33 U.S.C. § 1313(d)(2). The South New River Canal, from which S-9 pumps water into the Everglades, is so fouled by urban fertilizers, detergents, household chemicals and ground water contaminants that the canal is listed on the official approved 303(d) list as being impaired – polluted beyond legal limits – as to nutrients,[9] dissolved oxygen and coliforms. U.S. EPA, REGION 4, DECISION DOCUMENT REGARDING DEPARTMENT OF ENVIRONMENTAL PROTECTION'S § 303(d) LIST AMENDMENT, *available at* http://www.epa.gov/region4/water/tmdl/florida/florida303d_update.pdf (App. 8) [hereinafter "EPA DECISION DOCUMENT"].[10] The portion of the Everglades

[9] Nutrients are primarily phosphorus and nitrogen which are constituents of fertilizers used in cities and farms.

[10] The EPA DECISION DOCUMENT lists individual segments of water bodies and gives each a Water Body Identification Number ("Wbid"). The South New River Canal (also known as C-11 West) has been given Water Body Identification Number 3279 and is listed as impaired as to nutrients, coliforms and dissolved oxygen. EPA DECISION DOCUMENT at 140 (App. 8, 18a). A map depicting these areas is attached as Appendix 9. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, 303(d) LISTED WATER SEGMENTS IN BROWARD COUNTY, *available at* http://www.dep.state.fl.us/water/tmdl/docs/maps/broward.pdf (last visited Nov. 10, 2003). The Water Body Identification Numbers appear on a table on the right side of the map; the various impaired waters are depicted as a salmon color; and the C-11 West canal (South New River Canal) is located about ½ inch southeast of the D in the word "Broward" on the map, immediately above Wbid number 3279 on the map. (App. 9, 19a).

that receives this polluted water is similarly listed as being impaired as to nutrients and dissolved oxygen.[11] *Id.*

## D. THE COMPREHENSIVE EVERGLADES RESTORATION PROJECT

The Comprehensive Everglades Restoration Project ("CERP") is a joint federal and state project to re-engineer many of South Florida's canals and pump stations to provide additional water supply to urban and agricultural areas as well as to the Everglades.[12]

The CERP includes plans for modifications to the S-9 pumping station. It calls for the construction of an auxiliary pump station to gather ground water seepage and discharge it into the surface waters of the Everglades (the S-9A project discussed above). In addition, the CERP also plans for the impoundment and diversion to the south of some urban storm water. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, EVERGLADES REGULATION: C-11 WEST, *at* http://www.sfwmd.gov/org/reg/esp/c11w.html (last visited Nov. 7, 2003) (*see* section entitled "Future Plans," ¶4). The District's web site states that "neither of the two Federal

[11] The EPA DECISION DOCUMENT also shows that the waters in the Everglades that receive discharge from S-9 (Wbid Numbers 3268, 3268A and 3278A) are similarly impaired as to nutrients, dissolved oxygen and mercury. EPA DECISION DOCUMENT at 140 (App. 8, 18a); 303(d) LISTED WATER SEGMENTS IN BROWARD COUNTY (App. 9, 19a).

[12] CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL PROJECT COMPREHENSIVE REVIEW STUDY, FINAL INTEGRATED FEASIBILITY REPORT AND PROGRAMATIC ENVIRONMENTAL IMPACT STATEMENT, SUMMARY, vii-x (Apr. 1999), *available at* http://www.evergladesplan.org/docs/comp_plan_apr99/summary.pdf. The District has sought to lodge a hard copy of this document with the Court.



projects is specifically being designed for treatment of stormwater"[13] although it is anticipated that some water quality improvements may result. *Id.*

## E. THE EVERGLADES FOREVER ACT PERMIT

The United States Department of Interior has brought extensive water pollution litigation against the District and the State of Florida because the District was pumping and conveying nutrient-laden agricultural storm water into the Loxahatchee National Wildlife Refuge and the Everglades National Park. *United States v. South Florida Water Management District*, 28 F.3d 1563, 1568-79 (11th Cir. 1994). One outcome of that case was a settlement that resulted in passage of the Everglades Forever Act, section 373.4592, Florida Statutes (2002).[14] Section 9 of that Act required the District to obtain a pollution discharge permit for structures such as the S-9 pumping station, and required the discharge from that pump station to comply with all water quality standards by December 31, 2006. § 373.4592(9)(k), Fla. Stat. (2002); *see also* FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, FINAL PERMIT, *available at* ftp://everglades.dep.

[13] *Compare*, Pet'r Br. at 12, characterizing these same components as being designed to reduce pollution.

[14] The Act called for pollution source reduction and an array of treatment works to remove much of the nutrients before they could reach the Everglades. The treatment works are denominated the Everglades Construction Project. A permitting system was also required under section 9(k) of the Act for other pumping stations and water discharge structures that discharge pollutants into the Everglades but which are not part of the Everglades Construction Project. § 373.4592(9)(k), Fla. Stat.

state.fl.us/permitting/Non-ECP/Non-ECP%20Permit.pdf (last visited Nov. 7, 2003).[15] It requires only "public outreach" by the District and the promulgation of voluntary landscaping practices that, if followed, might help to reduce pollution. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, EVERGLADES REGULATION: C-11 WEST, *at* http://www.sfwmd.gov/org/reg/esp/c11w.html (last visited Nov. 7, 2003).

In 2003, the Florida legislature passed amendments to the Everglades Forever Act. Ch. 2003-12, Laws of Florida. Those amendments replace the former Act's specific deadlines with a "long-term plan" for achieving water quality standards in the Everglades. Ch. 2003-12, § 1 (amending § 373.4592, Fla. Stat.).[16]

The Long-Term Plan does not call for the S-9 discharge to be in full compliance with water quality standards until 2036. Specifically, the Long-Term Plan at page 6-86 states as to the C-11 West basin that:

> [E]ach alternative assumed that the long-term strategy to comply with water quality standards, including the numeric phosphorus criterion, would rely on completion of the Western C-11 Impoundment and Diversion Canal CERP Project (2006 completion) and the North Lake Belt Storage CERP Project (2036 completion).

[15] This document is posted on the Florida Department of Environmental Protection's web site and the page references are to pages in the current Everglades Forever Act permit.

[16] Section 1 of Chapter 2003-12 amended section 373.4592(2), Florida Statutes to add a definition reading: "Long Term Plan" or "Plan" means the district's "Everglades Protection Area Tributary Basins Conceptual Plan For Achieving Long-Term Water Quality Goals Final Report" dated March 2003, as modified herein. § 373.4592(j), Fla. Stat. That same section of Ch. 2003-12 also amended section 373.4592(3), Florida Statutes – the Everglades Forever Act – so as to substitute this Long-Term Plan for the previous compliance schedule.



BURNS & MCDONNELL, EVERGLADES PROTECTION AREA TRIBUTARY BASINS CONCEPTUAL LONG-TERM PLAN FOR ACHIEVING WATER QUALITY GOALS FINAL REPORT at 6-86 (Mar. 17, 2003), *available at* http://exchange.law.miami.edu/everglades/restore/FinalConceptual/finalconceptual_031703%20(3.43mb).pdf (last visited Nov. 10, 2003) (parentheticals in original). The State of Florida and the District have previously used "long-term" plans as a substitute for compliance deadlines. In 1987, the Florida legislature passed the "Surface Water Improvement and Management Act," which found that

> [S]urface water problems can be corrected and prevented through plans and programs for surface water improvement and management that are planned, designed, and implemented by the water management districts and local governments.

§ 373.451(5), Fla. Stat. (2002). Now, 16 years later, Florida is still aiming to meet water pollution limits in the Everglades. However, the deadline for compliance has been postponed until the year 2036 – 64 years after passage of the Clean Water Act.

In its permit application for the state permit, the District explained that it operates the C-11 canal and the S-9 pumping station for the following purposes:

> The Project canals and control structures in the C-11 basin have four functions: (1) to provide

> flood protection and drainage for the basin, (2) to supply water to the basin during periods of low natural flow, (3) to intercept and control seepage from Water Conservation Area (WCA) 3A, and (4) to maintain a groundwater table elevation west of S-13 adequate to prevent saltwater intrusion into local groundwater.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, FINAL PERMIT (EXHIBIT A) at II-33, *available at* ftp://everglades.dep.state.fl.us/permitting/Non-ECP/Non-ECP%20Permit%20Exhibit%20A.pdf (last visited Nov. 7, 2003). The District did not include allocation of water to the Everglades west of the pump station as one of the S-9 pumping station's functions.

## ARGUMENT

### I

### THE DISTRICT'S OPERATION OF THE S-9 PUMPING STATION REQUIRES AN NPDES PERMIT BECAUSE IT ADDS GROUND WATER POLLUTANTS TO THE WATERS IT DISCHARGES INTO THE EVERGLADES

The heart of the District's argument is that it should not be held responsible for the pollution it discharges into the Everglades through the S-9 pumps because the pumps are not responsible for physically introducing pollution into the waters of the South New River Canal. Pet'r Br. at 20, 26-27. That claim is inconsistent with the District's explanation of the S-9 pumping station in its brief and contradicts the only government studies of that issue.



As stated in the District's brief, a major component of the S-9 discharge is ground water seepage. Pet'r Br. at 11. When the S-9 pumps are operating, their rapid withdrawal of immense quantities of water from the South New River Canal dramatically lowers the water level of the canal and causes ground water to flow into the canal.[17] As described in a United States Geological Survey report that investigated the effects of the operation of the S-9 pumps:

> Surface water inflow from lateral canals and ground-water inflow are the chief means of raising canal water-levels after pumping ceases. On several occasions, groundwater was seen seeping from the banks of South New River Canal during and after pumping.

FREIBERGER REPORT at 14 (App. 7, 14-15a).

Ground water has different chemical characteristics and contaminants than surface water because it stays in the ground and has long contact with polluting materials

[17] The District also forces ground water into the South New River Canal by holding the water levels in the Everglades west of the levee at a much higher elevation than the water levels in the South New River Canal. (App. 4, 11a). This difference in water elevation forces ground water to flow beneath the levee and come up into the C-11 basin where it is collected in District canals and then discharged by the S-9 pumps. Pet'r Br. at 11. The ground elevation in the C-11 basin is lower than the Everglades west of the levee because drainage operations have caused the disappearance of at least four feet of muck soil that formerly covered the lands in this region. EVERGLADES INTERIM REPORT at 2-10, *available at* http://www.sfwmd.gov/org/ema/everglades/interimrpt_98/chpt2.pdf. The lowering of ground levels in the C-11 basin has resulted in the flooding problems described in the amicus brief of the City of Weston.

in the soils and rock. 55 Fed. Reg. 47,990, 47,995-96 (Nov. 16, 1990). Typical ground water pollutants include total dissolved solids (salts and minerals that are dissolved in the water) that degrade surface waters into which they are discharged. FREIBERGER REPORT at 20 (App. 7, 15a); *see also Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003), *cert. denied*, 2003 U.S. LEXIS 7730 (Oct. 20, 2003).

It does not matter whether the ground water pollutants are naturally occurring or are introduced by human activities. In *Fidelity*, the Environmental Protection Agency rejected a state agency's attempt to exempt naturally occurring ground water pollutants from point source regulations. 325 F.3d at 1162-63. The EPA's position was upheld by the Ninth Circuit which ruled that a mine operator was required to obtain an NPDES point source permit for a discharge of ground water to surface water even though the pollutants had not been introduced into the ground water by the discharger. *Id.* Because the operation of the S-9 pumping station causes ground water to flow into the South New River Canal, and then discharges this ground water seepage into the Everglades, the discharge of this ground water through the S-9 pumps requires an NPDES permit.



## II

## THE SOLICITOR GENERAL'S "UNITARY WATERS" THEORY CONTRADICTS THE EXPRESS TERMS OF SECTION 402 WHICH REQUIRES PERMITS FOR ANY DISCHARGE WHICH ADDS POLLUTANTS

### A. The New Exemption From Section 402 Of The Clean Water Act Sought By The District And The Solicitor General Cannot Be Reconciled With The Express Terms Of The Act

The discharge from the S-9 pumps is a mixture of storm water and ground water. As set out in Argument I, the ground water at issue here contains pollutants and the discharge of polluted ground water into the Everglades requires an NPDES permit. However, if the discharge were entirely storm water it would still be subject to regulation under section 402(p) of the Clean Water Act, which requires NPDES storm water permits for discharges which either: a) contribute to a violation of a water quality standard in the receiving water; or b) are a significant contributor of pollutants. 33 U.S.C. § 1342(p), CWA § 402(p) (App. 10, 20a-21a). The "unitary waters" theory of the District and the Solicitor General would create an exemption from this statutory requirement. Such a sweeping exemption has no basis in the language or purposes of the Clean Water Act.

Subsection 1342(p)(1) generally exempts storm water from regulation prior to 1994 but requires NPDES permits for five specified categories of discharges composed entirely of storm water. Those five categories are set out in the next subsection, subsection 1342(p)(2): (A) previously permitted discharges, (B) discharges from industrial activity, (C) large municipal storm water systems, (D)

medium municipal storm water systems (urban run-off) and (E) discharges where the Administrator or the delegated state administrator determines that the discharge "*contributes to a violation of a water quality standard*" in the receiving water *or* is a "*significant contributor of pollutants*" to the receiving water. 33 U.S.C. § 1342(p)(2), CWA § 402(p)(2) (App. 10, 20a) (emphasis added).

After 1994, additional storm water discharges that require NPDES permits were to be designated by EPA rules:

> [T]he Administrator . . . shall issue regulations . . . which designate stormwater discharges, *other than those discharges described in paragraph (2)* to be regulated to protect water quality. . . .

33 U.S.C. § 1342(p)(6), CWA § 402(p)(6) (App. 10, 21a) (emphasis added). The regulations to be promulgated under this latter section cannot address the five categories of storm water discharges for which NPDES permits are already required by statute.

The requirement of a storm water permit for discharges that contribute to water quality violations is not merely of academic interest. The water discharged through S-9 into the Everglades is categorized by the EPA and the State of Florida as impaired by pollution. Clean Water Act section 303(d) requires states to file with the EPA reports that identify water bodies within the state that are so polluted that they fail to meet established water quality standards. 33 U.S.C. § 1313(d), CWA § 303(d). The EPA then approves (or modifies) the list of "impaired" waters. 33 U.S.C. § 1313(d)(2), CWA § 303(d)(2). The South New River Canal from which S-9 pumps water into the Everglades is listed on the official



approved 303(d) list as being impaired – polluted beyond legal limits – as to nutrients,[18] dissolved oxygen and coliforms. EPA DECISION DOCUMENT at 140 (App. 8, 18a).[19] The portion of the Everglades that receives this polluted water is similarly listed as being impaired as to nutrients and dissolved oxygen.[20]

Given that both the South New River Canal and the Water Conservation Areas are in violation as to the same pollution parameters, it appears that Florida and the EPA have determined that the S-9 pump discharge "contributes to a violation of a water quality standard." Therefore a Clean Water Act section 402(p)(2)(e) NPDES permit would be required if the discharge were composed entirely of storm water.

### B. There Is No Exemption In The Clean Water Act Based On The Construction History Of The Drainage Source

The District and Solicitor General attempt to parlay the construction history of the discharge source into a new exemption from the Clean Water Act. It is an established

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[18] Nutrients are primarily phosphorus and nitrogen which are contaminants found in urban run-off and (as to phosphorus) also in ground water.

[19] A map which graphically depicts these areas is attached as Appendix 9.

[20] The EPA DECISION DOCUMENT and related map also show that the waters in the Everglades that receive discharges from S-9 (Wbid Numbers 3268, 3268A and 3278A) are similarly impaired as to nutrients, dissolved oxygen and mercury. (App. 8, 18a; App. 9, 19a).

fact that the canal from which pollutants are pumped into the Everglades was carved out of the Everglades area as a separate water body some 50 years ago through human construction activity. *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.2d 1364, 1366 (11th Cir. 2002). However, impoundments of waters by levees or dams are specifically included in the definition of "Waters of the United States." 40 C.F.R. § 122.2(d) (including "[a]ll impoundments of waters otherwise defined as waters of the United States under this definition"); *see Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) (man-made pond connected to the Pacific Ocean constituted navigable waters for Clean Water Act regulatory purposes).

As these waters exist today, the pollutants contained in water collected in the drainage canal would not flow into the Everglades except for the operation of the S-9 pumping station. *Miccosukee*, 280 F.3d at 1368-1369 and n.8. Waters from the South New River Canal now "intermingle" with the waters of the Everglades only to the extent that the canal waters are forced upward several feet by industrial-scale pumps.

The Solicitor General and the District argue that the entirety of the waters of South Florida, including the waters of Lake Okeechobee (a drinking water source), the Everglades (including the impaired waters of the Water Conservation Areas and the nearly pristine waters of Everglades National Park), the agricultural canals that receive pollution from 700,000 acres of sugar cane fields, and canals in urban drainage basins that receive urban storm water pollution containing urban fertilizers, detergents, household chemicals, gas, and oil are one water body because a century ago these waters had a "hydrologic



association." Pet'r Br. at 22, 47-49; Br. of the United States at 15-20. This merging of water bodies for the purpose of avoiding water pollution regulation is the very antithesis of the Clean Water Act approach which is to designate the uses and establish water quality standards for each individual water body for the specific purpose of protecting the distinct, unique character of each of these natural resources. 33 U.S.C. §§ 1313(c)(1), (2), CWA § 303(c)(1), (2). Under this argument, the District, with impunity from NPDES permitting, would be able to pump waters from drainage canals that fail to meet the standard for human recreation and fish and wildlife propagation and survival, into Lake Okeechobee, a designated drinking water resource.

East of pump station S-9 is a weed choked and debris-strewn canal draining urban subdivision developments and commercial areas; west of S-9 is the priceless Everglades marsh. Under these circumstances, it cannot be fairly argued that the South New River Canal and the Everglades are the same body of water such that pollutants that are in the canal are already located within the Everglades.

## III

## THE DISTRICT IS NOT ENTITLED TO AVOID THE SECTION 402 PERMITTING REQUIREMENT BY CLAIMING THAT DISPOSAL OF GROUND WATER SEEPAGE AND STORM WATER CONSTITUTES AN ALLOCATION WITHIN THE MEANING OF SECTION 101(g)

The District and the Solicitor General argue that CWA section 101(g), 33 U.S.C. § 1251(g), supports the exemption

of the S-9 pump station from the NPDES permit requirement because regulation of water pollution cannot interfere with allocation of water by the state. Br. of the United States at 25 n.11; Pet'r Br. at 2-3. The District claims that the S-9 pumping station is "allocating" water because it is "used to provide the WCA with water for beneficial uses or for release to Everglades National Park." Pet'r Br. at 11. However, in its application for the state Everglades Forever Act permit for the S-9 pumping station, the District explained the purpose and function of the drainage canal and pumping station:

> The Project canals and control structures in the C-11 basin have four functions: (1) to provide flood protection and drainage for the basin, (2) to supply water to the basin during periods of low natural flow, (3) to intercept and control seepage from the Water Conservation Area (WCA) 3A, and (4) to maintain a groundwater table elevation west of S-13 adequate to prevent saltwater intrusion into local groundwater.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, FINAL PERMIT (EXHIBIT A) at II-33, *available at* ftp://everglades.dep.state.fl.us/permitting/Non-ECP/Non-ECP%20Permit%20Exhibit%20A.pdf (last visited Nov. 7, 2003). The District's permit application correctly stated the facts. The District is not "allocating"; it is "disposing." It is not the need for water in the Everglades that triggers the decision to pump water at the S-9 pump station – it is high water levels in the South New River Canal. The pumps are started when the canal level reaches four feet NGVD and are turned back off when the water has been lowered to one foot NGVD. Pet'r Br. at 11. As the City of Weston has vividly explained: 1) the pumps are disposing of floodwaters; 2) without the pumps the entire South New River Canal basin (the C-11 West basin) would be flooded; and 3) the pumps are turned on to pull the canal down whenever storms are approaching. Br. of Amicus City of Weston at 4-6. The District is collecting, conveying, and disposing of unwanted ground water and storm water, not allocating water to the Everglades.



## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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*Counsel for Amici Curiae*

## INDEX FOR APPENDICES


| | | Page |
|---|---|---|
| 1. | SOUTH FLORIDA WATER MANAGEMENT DISTRICT, PUMPING STATIONS (1973) | 1a |
| 2. | U.S. ARMY CORPS OF ENGINEERS, INTERIM WATER CONTROL PLAN FOR PUMPING STATION 9A AND STRUCTURE 381, *available at* http://www.saj.usace.army.mil/projects/dwcp_c11.htm, § 7.02, ¶ 4 (May 2002) | 6a |
| 3. | SOUTH FLORIDA WATER MANAGEMENT DISTRICT, EVERGLADES INTERIM REPORT 2-11 (Jan. 1, 1999), *available at* http://www.sfwmd.gov/org/ema/everglades/interimrpt_98/chpt2.pdf | 9a |
| 4. | SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ECOLOGICAL IMPACTS OF DROUGHT IN THE WATER CONSERVATION AREAS (Apr. 13, 2001), *available at* http://www.sfwmd.gov/org/wrp/wrp_evg/reports/drought_0401/drought0401.pdf | 11a |
| 5. | MAP OF C-11 WEST BASIN AND CANAL IN CENTRAL BROWARD COUNTY, *at* http://www.sfwmd.gov/org/exo/broward/c11bmp/images/jpgs/c-11west.jpg | 12a |
| 6. | SOUTH FLORIDA WATER MANAGEMENT DISTRICT, TURF & LANDSCAPE BEST MANAGEMENT PRACTICES FOR THE C-11 WEST CANAL BASIN, *at* http://www.sfwmd.gov/org/exo/broward/c11bmp/execsum.html | 13a |

INDEX FOR APPENDICES – Continued

Page

7. HERBERT J. FREIBERGER, U.S. GEOLOGICAL SURVEY, EFFECTS OF BACKPUMPING FROM SOUTH NEW RIVER CANAL AT PUMP STATION S-9 ON QUALITY OF WATER IN WATER CONSERVATION AREA 3, BROWARD COUNTY, FLORIDA 12, Open-File Rep. No. 73026 (1973)..... 14a

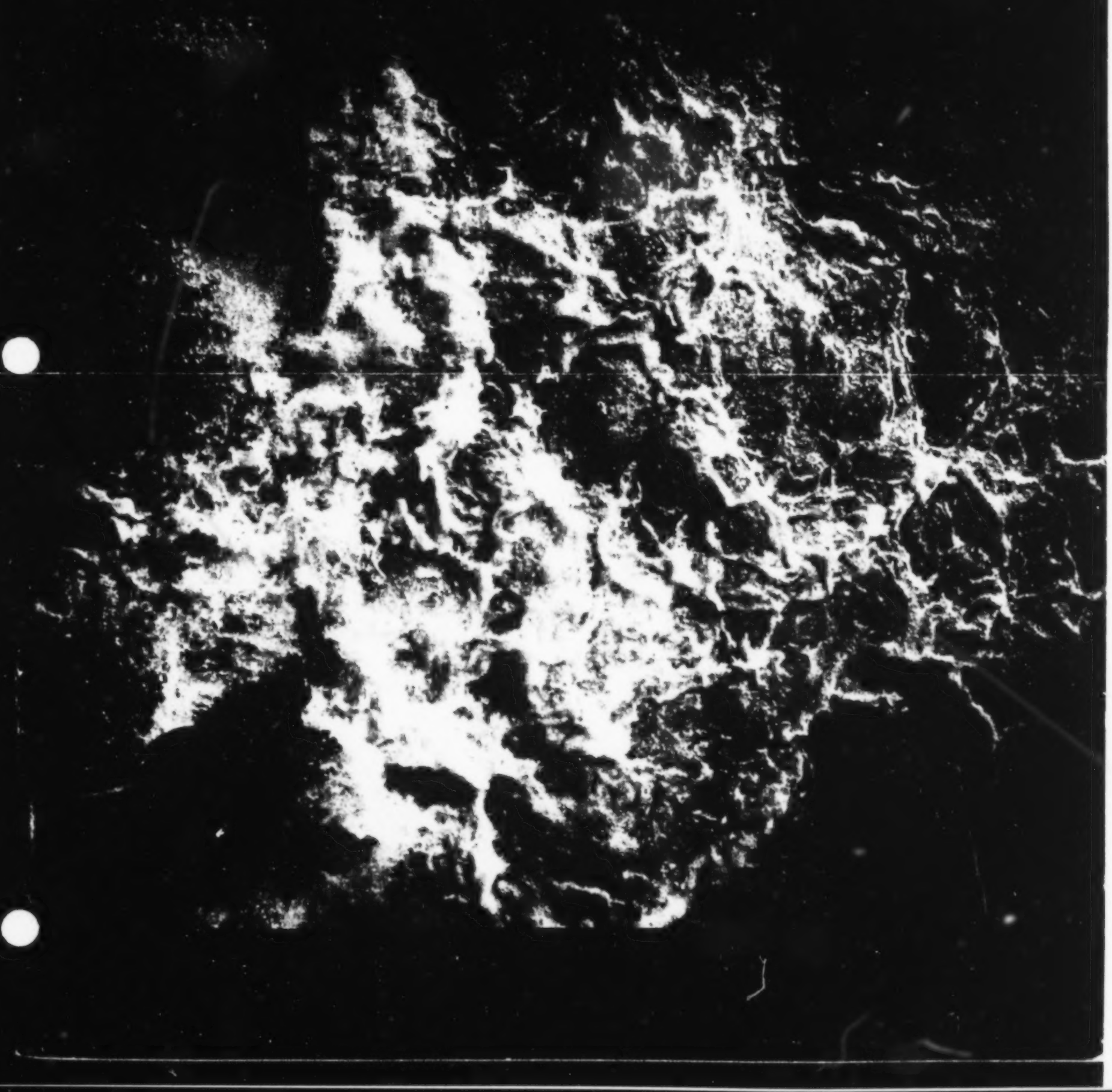
8. U.S. EPA, REGION 4, DECISION DOCUMENT REGARDING DEPARTMENT OF ENVIRONMENTAL PROTECTION'S § 303(d) LIST AMENDMENT, *available at* http://www.epa.gov/region4/water/tmdl/florida/florida303d_update.pdf..... 18a

9. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, 303(d) LISTED WATER SEGMENTS IN BROWARD COUNTY, *available at* http://www.dep.state.fl.us/water/tmdl/docs/maps/broward.pdf..... 19a

10. Clean Water Act 33 U.S.C. § 1342 (2003)..... 20a

94

# Pumping Stations



# S-9

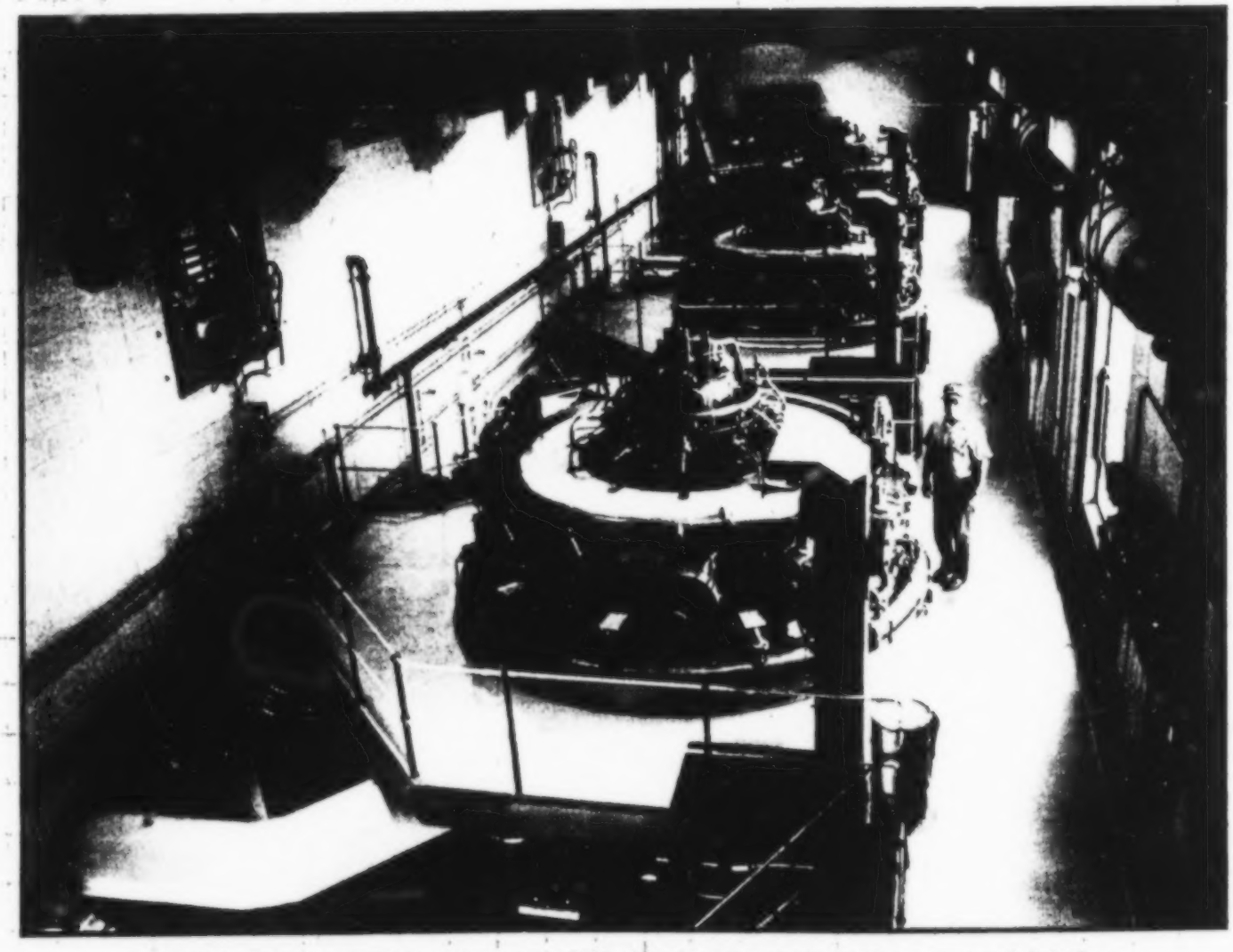
Pumping Station No. 9 was accepted by the South Florida Water Management District on 9 August 1957. It is designed to remove ¾-inch of water in 24 hours from a 71-square-mile drainage area served by the South New River Canal. The pumping capacity of this station is 1,861,392,900 gallons in 24 hours.

S-9 is located at the west end of the South New River Canal, at the eastern edge of Water Conservation Area 3-A, and ¼-mile west of U.S. Highway 27.

Water Conservation Area 3-A receives the water discharged by this station, storing it for future use during the dry season.

## Statistics

| | |
|---|---|
| **ENGINES** | |
| Number | 3 |
| Type | Diesel, 11 cylinder radial Nordberg |
| Horsepower, each engine | 1655 |
| Operating rpm (max.) | 400 |
| Fuel consumption, each engine | 65 gph |
| **PUMPS** | |
| Number | 3 |
| Type | Vertical propeller, axial-flow, 135 inches |
| Diameter of propeller | 122 inches |
| Design speed of propeller | 128 rpm |
| Pumping capacity of each pump under design conditions | 960 cfs (430,878 gpm) |
| Design head differential | 10.4 feet |
| **CONTRACT COSTS** | $1,401,950 |



Of the Distict's 18 pumping stations, only S-9's diesel engines feature this unique radial design.





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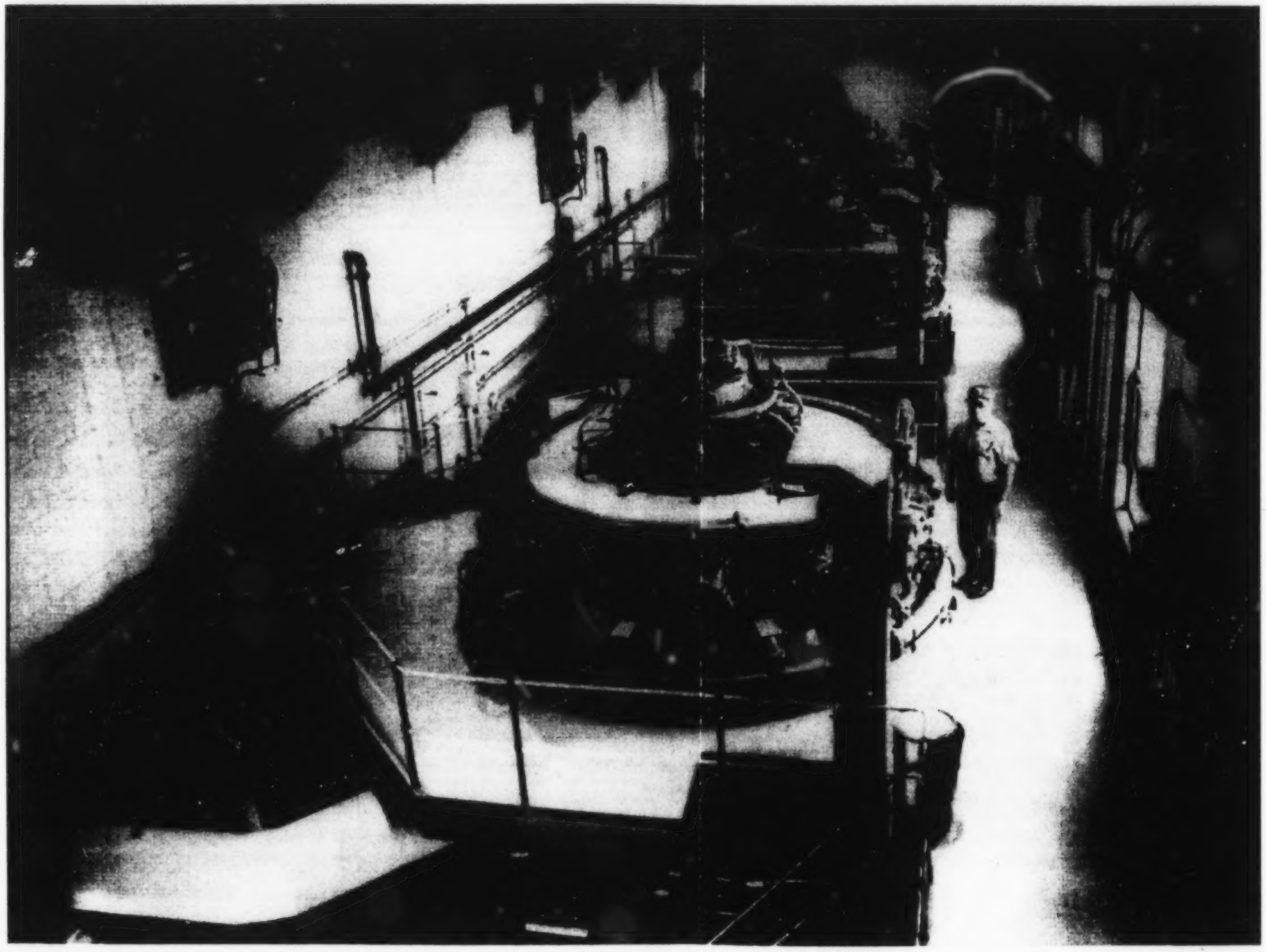
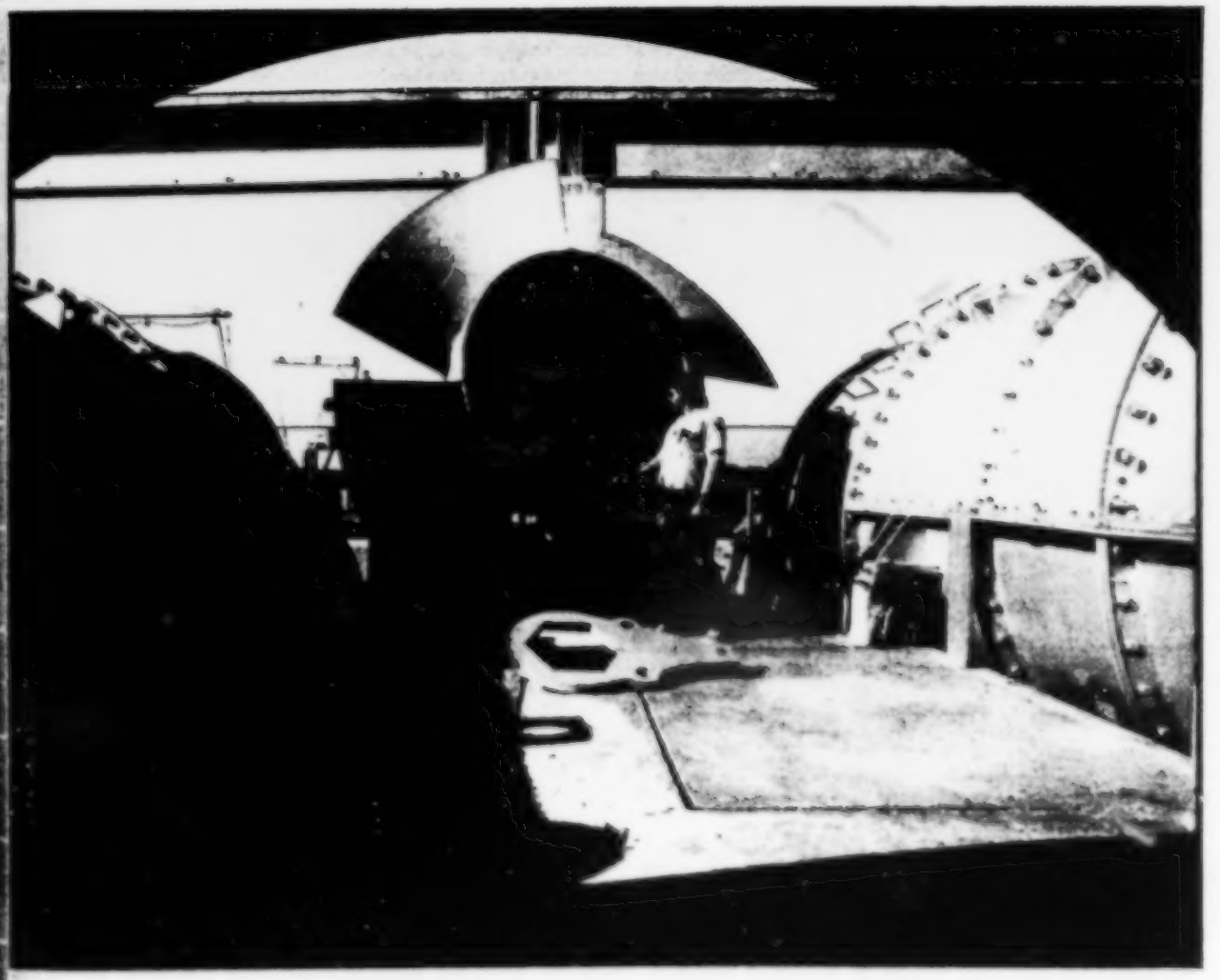
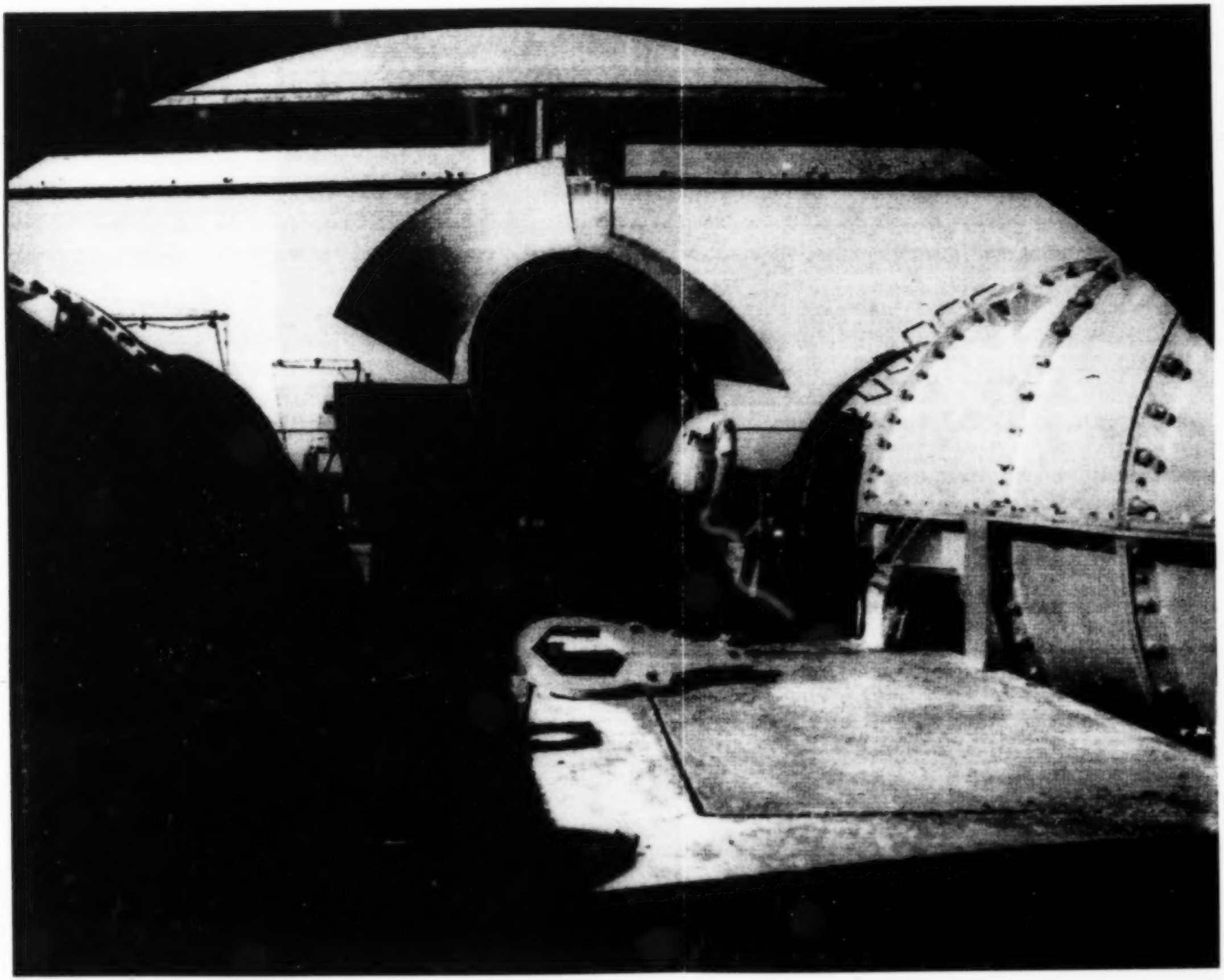


Remote locations make self-sufficiency important to station operations. Storage tanks at each station hold diesel fuel in reserve; S-5A stores up to 100,000 gallons, S-13 can hold 3,000 gallons.



Huge propellers in the intake pipes create the vacuum which pulls water in from the canal. The propeller shown at left has been removed with the aid of a supersized wrench, resting in the foreground.



**APPENDIX 2**

INTERIM WATER CONTROL PLAN

FOR

PUMPING STATION 9A

AND

STRUCTURE 381

JACKSONVILLE DISTRICT
U.S. ARMY CORPS OF ENGINEERS
May 2002

* * *

**7-01. General Objectives.**

* * *

With the addition of the S-9A pumps, the existing S-9 pump station will only be used as needed for pumping larger runoff events or canal drawdown prior to anticipated events. This will prevent over pumping into WCA 3, prevent over drainage of C-11, and reduce movement of bottom sediments. The operation of S-9A is expected to be near continuous to match the seepage losses from the WCAs which will also aid in consistent canal stages.

**7-02. Features.**

The S-9A pump station is a seepage control pump station that will replace the existing S-9 pump station's role of pumping seepage losses from WCA-3 which are collected in from the L-37, L-33, and U.S. Highway 27. This pump station will provide a total pumping capacity of 500 cfs, will be located on the L-37 Levee just north of the existing S-9 pump station, and will discharge into C-304 in

eastern WCA-3A. Pumping seepage will be the primary role for the S-9A structure however, S-9 can perform this function if needed for larger forecasted storm events.

* * *

The existing S-9 pump station is a flood control pump station for the Western C-11 basin. This pump station provides a total pumping capacity of 2,880 cfs. S-9 is a 3-bay pump station with three 960 cfs diesel engine driven pumps. The pump station is located at the western end of the C-11 Canal between the L-37 and L-33 Levees.

* * *

**7-04. Overall Plan for Water Control.**

* * *

The flood control phase of operation is characteristic of periods of pumping runoff events that have occurred in the C-11 basin in order to remove excess runoff or regain canal storage.

* * *

**7-09. Flood Control Operations.**

The three large S-9 pumps will continue to operate according to their existing flood control regulation with pumping beginning at 4.0 ft., NGD or sooner as measured at S-13A headwater. The C-11 canal will operate as stated in Chapter 7 of the "Master Water Control Manual East Coast Canals" and the "Master Water Control Manual Water Conservation Areas, Everglades National park, and ENP-South Dade Conveyance System". The S-9 and S-9A pumping station will be operated whenever the water level in the C-11 at S-13A exceeds elevation 4.0 ft., NGVD;



however, the water surface should not be drawn down below elevation 0.0 ft., NGVD at the pumping station S-9. Under design head the S-9 pumping station capacity is 2,880 cfs and the S-9A capacity is 500 cfs with a total operating flow not to exceed 2,880 cfs per the non-ECP operating permit. The non-ECP permit does not permit the total flow from S-9 and S-9A to exceed 2,880 cfs.

* * *

---

## APPENDIX 3

**Everglades**
**INTERIM REPORT**

**JANUARY 1, 1999**

**SOUTH FLORIDA WATER MANAGEMENT DISTRICT**

* * *

### Chapter 2: Hydrologic Needs: The Effects of Altered Hydrology on the Everglades

* * *

### Post-C&SF Project

* * *

The first major earthworks of the C&SF Project was to construct a 100-mile-long series of levees and borrow canals from Palm Beach to Dade counties. These levees were completed during 1952 to 1954 and became the eastern boundaries of what would become the WCAs, effectively stopping Everglades sheetflow from advancing on urban coastal areas. The next step during the period 1954 to 1959 entailed construction of levees 5, 6 and 7, which formed the northern and western boarders of the WCAs. Construction of additional levees (1 through 4 and 28) completed the partitioning off of 700,000 acres (283,290 ha) of deep muck lands that became known as the Everglades Agricultural Area (EAA). Flood protection for the EAA was provided by construction of large-capacity pump stations. Other flood protection activities during the 1954 to 1959 period included the deepening of the Hillsboro, North New River and Miami canals in the EAA and construction of water control structures (S-11A, S-11B and S-11C) that moved water from WCA-2 to WCA-3, thereby diverting it away from coastal areas. Pump stations (S-9



and private pump stations) were also constructed to move water west from urban areas into the WCAs.

* * *

---

## APPENDIX 4

April 13, 2001

### Ecological Impacts of Drought in the Water Conservation Areas

* * *

South Florida Water Management District

* * *

### General Information

* * *

### Water Conservation Areas 3A and 3B

Management of water levels within WCA-3A and WCA-3B is the responsibility of the District in accordance with regulation schedules set by the USACE. * * * Water levels in WCA-3A are regulated from 9.5 to 10.5 ft NGVD.

* * *

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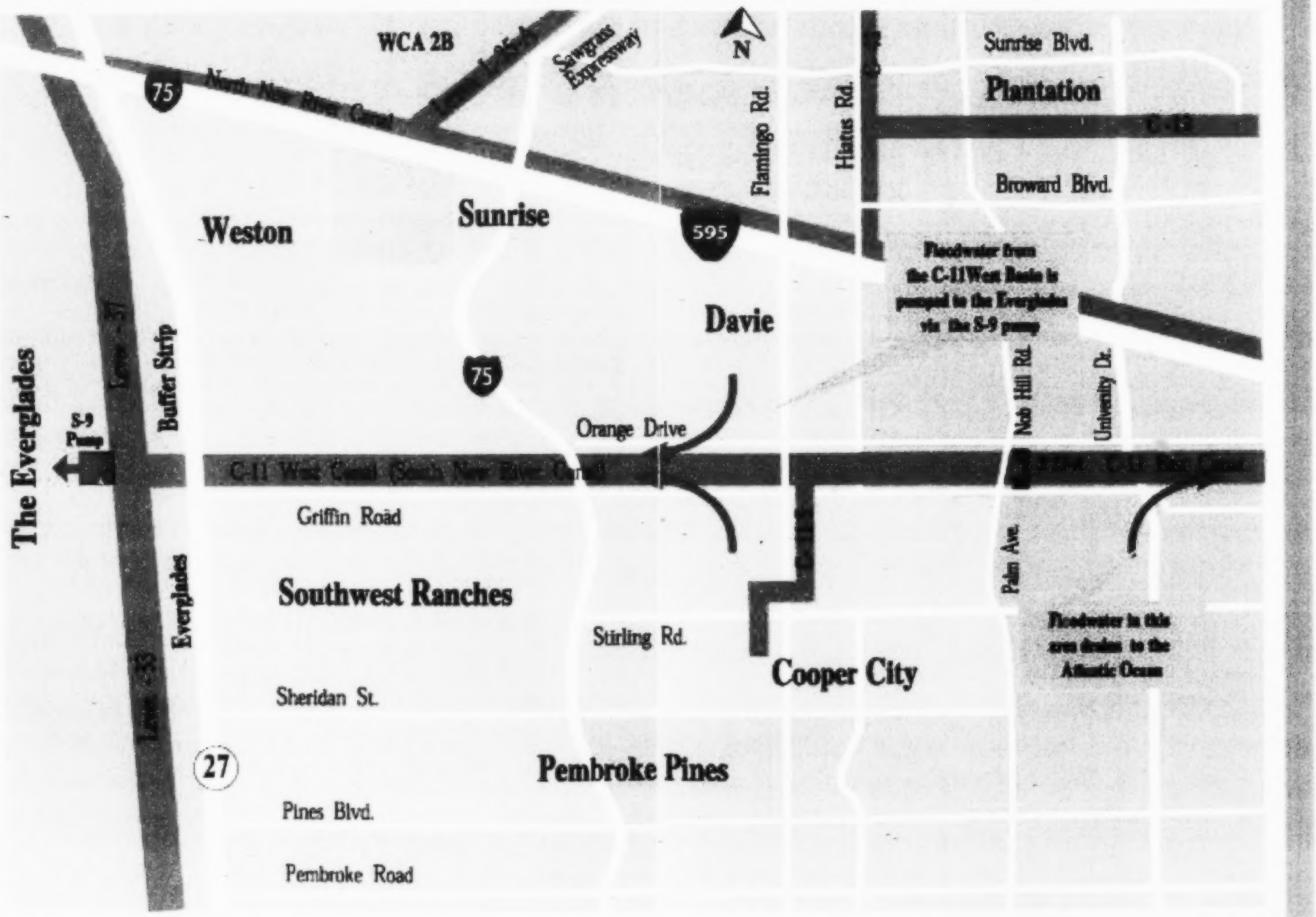
APPENDIX 5

# C-11 WEST BASIN and CANAL in CENTRAL BROWARD COUNTY




C - 11 West Basin

Map Not to Scale

## APPENDIX 6

**Turf & Landscape**

**Best Management Practices**

**for the C-11 West Canal Basin**
**Broward County, Florida**

**Executive Summary**

When it rains in the C-11 West Basin, urban fertilizers, detergents, household chemicals, gas, oil and other pollutants "wash off" roads, parking lots and driveways and are carried by "stormwater" into drainage canals. If excess fertilizer has been applied, there is also the potential for nutrient laden stormwater to "run off" of lawns and landscaping as well. Ditches, culverts and smaller canals within the basin eventually drain into the C-11 West Canal – and once in the C-11 West Canal – stormwater from the basin is pumped into the Everglades through the S-9 Pump Station just west of US 27 near Holiday Park.

Unlike Broward's other 14 drainage basins that also collect polluted stormwater in canals, the stormwater drains into the C-11 West Canal is discharged *directly* into the Everglades, in Water Conservation Area 3A. There is currently no type of structure to hold and process – or filter out – the pollution and sediments in canal water before it is discharged into the Everglades.

Because so much untreated stormwater is discharged into the Everglades by way of the C-11 West Canal, the C-11 West Basin has been cited as one of the top urban polluters of the Everglades.

* * *

**APPENDIX 7**

EFFECTS OF BACKPUMPING FROM SOUTH
NEW RIVER CANAL AT PUMP STATION S-9
ON QUALITY OF WATER IN WATER-CONSERVATION
AREA 3, BROWARD COUNTY, FLORIDA

By

Herbert J. Freiberger

OPEN-FILE REPORT
73026

Prepared by
U.S. GEOLOGICAL SURVEY
in cooperation with
CENTRAL AND SOUTHERN FLORIDA
FLOOD CONTROL DISTRICT

* * *

1973

* * *

[12] WATER MANAGEMENT

Water Levels

* * *

The ground-water levels in the drainage area range from about 6 feet above msl north of the canal to about 3 feet above msl south of the canal near Snake Creek Canal. The ground water level is about 4 feet above msl adjacent to South New River Canal.

* * *

[14] Surface-water inflow from lateral canals and ground-water inflow are the chief means of raising canal



water-levels after pumping ceases. On several occasions, ground water was seen seeping from the banks of South New Rivert Canal during and after pumping.

* * *

[20] WATER QUALITY

Background Data

* * *

[22] South New River Canal between S-9 and S-13A is occasionally contaminated by bacteria. Average total and fecal coliform counts are 5,550 and 330 colonies per 100 ml (milliliters) of water. Maximum total and fecal coliform counts were 20,400 and 1,300 colonies per 100 ml of water. The high concentrations of coliform bacteria that occasionally occur are presumably from cattle wastes.

* * *

[30] Dissolved Oxygen

* * *

Concentrations of dissolved oxygen at site 8, in South New River Canal east of S-9 were relatively lower (0.2 to 2.4 mg/l) during all four sampling periods when compared with concentrations in Conservation Area 3A (as high as 12.9 mg/l). Dissolved oxygen at site 8 was lower than father east in the canal because of the great amount of ground-water discharge to the canal east of S-9 after pumping.

* * *

[35] Decreases in dissolved oxygen west of S-9 (site 9) in Water Conservation Act 3A by backpuming were more

drastic in the dry season than in the wet season (fig. 13). During the west season, when much of the water in South New River Canal east of S-9 is derived from surface water, the dissolved oxygen is higher than during the dry season.

* * *

[45] Nitrogen

* * *

[56] The effects of backpumping on changes in nitrogen species were most pronounced at S-9, but changes were also observed in canals and marshes bordering the canals in Water-Conservation Area 3. Changes in nitrogen content in the canals of Water Conservation Act 3 were similar to changes in dissolved oxygen with respect to location. In effect, the greater the distance from the pump station, the less the degradation of the water due to increased nitrogren. The data in figures 22 and 23 show that degradation by ammonia in the two canals is most pronounced within a mile of the pump station.

* * *

[60] SUMMARY AND CONCLUSIONS

* * *

Backpumping of water at S-9 generally lowers the water level in South New River Canal near the pump station about 4 feet while at S-13A, the eastern end of the backpumping reach, the water level is lowered only about 2 feet. Much of the recharge to the canal near S-9 after pumping is from ground-water inflow which greatly influences the quality of water in South New River Canal.

* * *



[61] Dissolved oxygen concentrations in South New River Canal just east of S-9 were consistently low, presumably from the great amount of ground-water inflow to the canal. Dissolved oxygen west of S-9 was considerably higher than east of S-9. During backpumping, dissolved oxygen concentrations west of S-9 immediately decreased to about the same concentrations as east of S-9. Sags in dissolved oxygen were recorded in the canal system of Water Conservation Area 3 as far as 3 miles away from S-9. Dissolved oxygen in marsh sites remote from the conservation area canals did not decrease.

* * *

[62] Ammonia was the dominant form of nitrogen in the South New River Canal east of S-9 because of the lack of dissolved oxygen needed to convert it to nitrate. Ammonia in the canals of Water-Conservation Area 3 west of S-9 immediately increased when pumping began. Remote marsh sites were not affected. The areal extent of degradation was dependent on the amount of backpumping and on the amount of flow in the canals from releases from Water-Conservation Area 2.

---

**APPENDIX 8**

**DECISION DOCUMENT**
REGARDING
DEPARTMENT OF ENVIRONMENTAL
PROTECTION'S §303(d)
LIST AMENDMENT SUBMITTED ON
OCTOBER 1, 2002 AND SUBSEQUENTLY
AMENDED ON MAY 12, 2003

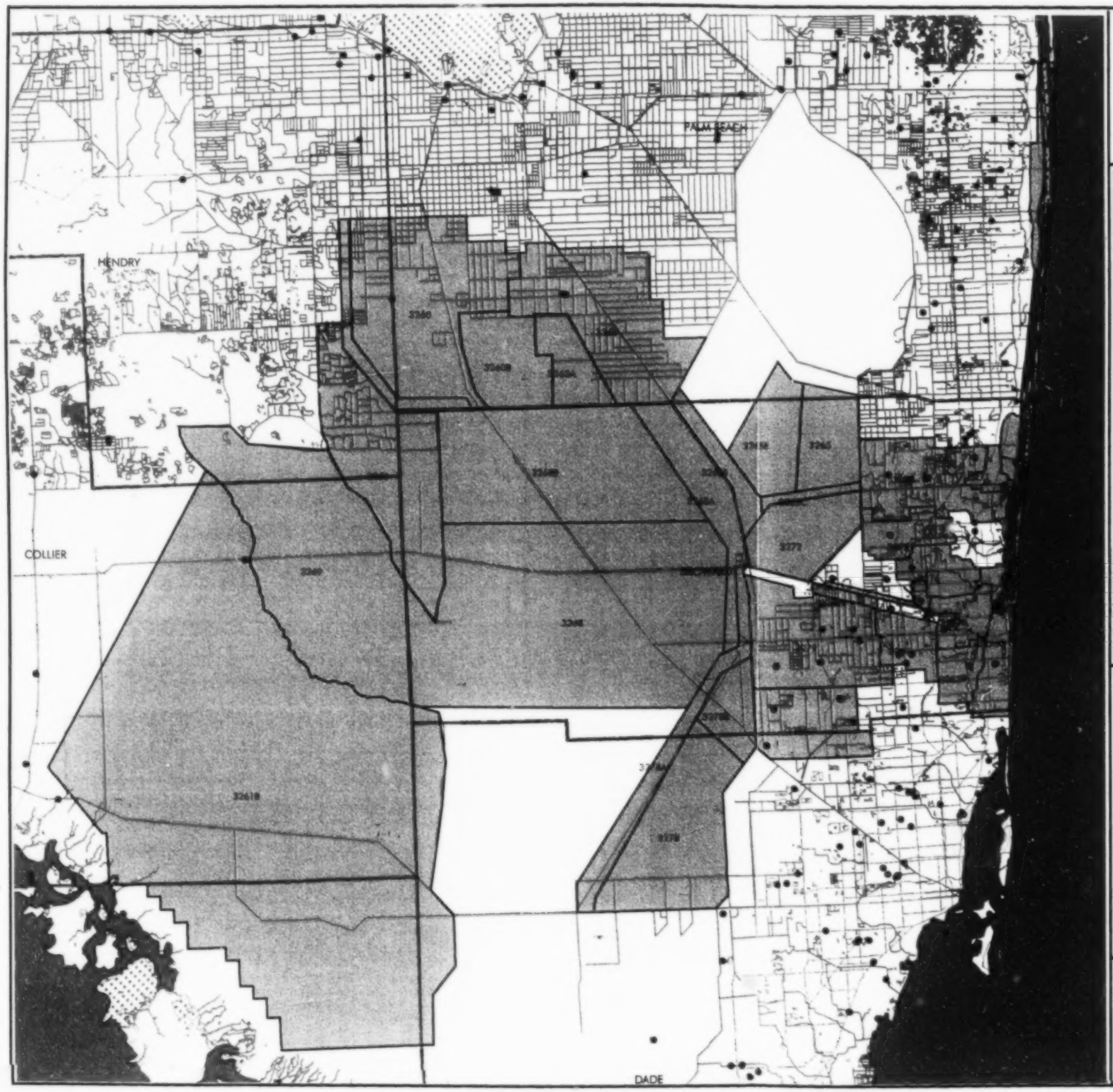
Prepared by the
Environmental Protection Agency, Region 4
Water Management Division

[Page 140]

June 11, 2003

| HUC Name | Water Segment | WBID | Parameters of Concern | Comments | Priority | Basin Rotation Group | Projected Year of TMDL Development |
|---|---|---|---|---|---|---|---|
| | | | * * * | | | | |
| SOUTHEAST FLORIDA COAST | WCA3B S-333 | 3278A | Dissolved Oxygen, Nutrients | | Low | Group 5 | 2011 |
| | | | * * * | | | | |
| SOUTHEAST FLORIDA COAST | WCA3A CENTER SECTOR | 3268 | Dissolved Oxygen, Nutrients, Mercury (Based on Fish Consumption Advisory) | | Low | Group 5 | 2011 |
| SOUTHEAST FLORIDA COAST | WCA3A US27 Perimeter | 3268A | Dissolved Oxygen, Nutrients | | Low | Group 5 | 2011 |
| | | | * * * | | | | |
| SOUTHEAST FLORIDA COAST | SOUTH NEW RIVER CANAL | 3279 | Dissolved Oxygen, Nutrients, Coliforms | | Low | Group 4 | 2010 |
| | | | * * * | | | | |

# APPENDIX 9




## 1998 303(d) Listed Water Segements in Broward County

Map prepared January 5, 2002 by the Bureau of Watershed Management, Division of Water Resource Management. This map is a representation of ground conditions and is not intended for delineations or analysis of the features shown. For more information or copies, contact Holli Brandt at (850) 921-9469, or holli.brandt@dep.state.fl.us Location: bdpw601 E:\various_maps\tmdl_areas_maps

| Basin | Wbid |
|---|---|
| ICWW AB POMPANO | 3226F |
| L-28 GAP | 3269 |
| Tamiami Canal | 3261B |
| WCA3B S-333 | 3278A |
| CONSERVATION AREA 3B | 3278 |
| S-8 | 3260 |
| L-3 | 3260A |
| S-7 | 3263 |
| HOLEY LAND | 3260B |
| HOLEY LAND | 3263A |
| L-28 INTERCEPTOR | 3266 |
| WCA2A CENTER SECTOR | 3265E |
| WCA2A EAST SECTION | 3265 |
| WCA2A SW PERIMETER | 3265B |
| WCA3A US27 PERIMETER | 3268A |
| WCA3A NORTH SECTOR | 3268B |
| C-14 | 3270 |
| POMPANO CANAL | 3271 |
| ICWW AB DADE CO. | 3226G |
| WCA2A L-35B PERIMETER | 3265C |
| CONSERVATION AREA 2B | 3272 |
| C-13 WEST | 3273 |
| WCA3A CENTER SECTOR | 3268 |
| C-12 | 3276 |
| C-11 WEST | 3279 |
| E. HOLLOWAY CANAL | 3277B |
| NORTH NEW RIVER CANAL | 3277 |
| NORTH NEW RIVER CANAL | 3280B |
| SOUTH NEW RIVER CANAL | 3277A |
| C-11 EAST | 3281 |
| C-10 | 3282 |
| WCA3B MIAMI CANAL | 3278B |
| C-9 WEST | 3284 |

### Legend

- County Boundary
- WAFR Facilities
  - NPDES (National) Facility
  - State or Local Facility
- Major Roads
- Water Lines
- Water Bodies
- 1998 303(d) Listed Waters

N

3 0 3 6 Miles

## APPENDIX 10

33 USCS § 1342 (2003)

§ 1342. National pollutant discharge elimination system

* * *

(p) Municipal and industrial stormwater discharges.

(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions. Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before the date of the enactment of this subsection [enacted Feb. 4, 1987].

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

* * *

(6) Regulations. Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

* * *

39

1881

(37)

No. 02-626

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF *AMICI CURIAE* OF THE NATIONAL TRIBAL ENVIRONMENTAL COUNCIL AND THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENTS

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**Counsel of Record for all Amici*

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## QUESTION PRESENTED

Whether a massive pump system and storm sewer that back-pumps pollutants from a 71-square-mile drainage area of Broward County into the Everglades and onto Miccosukee tribal lands through four huge pipes is a "point source" under the Clean Water Act obliged to secure an NPDES permit?

TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF AMICI CURIAE | 1 |
| STATEMENT OF FACTS | 3 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 9 |
| I. THE INTRODUCTION OF POLLUTED WATERS BY ONE SOVEREIGN INTO THE WATERS OF ANOTHER SOVEREIGN IS PROPERLY THE SUBJECT OF FEDERAL REGULATION UNDER THE CLEAN WATER ACT AND THUS NPDES PERMITTING IS NECESSARY AND APPROPRIATE HERE AS THE DISCHARGE OF POLLUTANTS BY FLORIDA ADVERSELY AFFECTS INDIAN RIGHTS AND PROPERTY | 9 |
| II. CONSIDERATIONS OF ENVIRONMENTAL JUSTICE REINFORCE THE CONCLUSION THAT THE NPDES PERMIT PROVISIONS SHOULD BE APPLIED TO PROTECT TRIBAL LANDS | 12 |
| III. THE S-9 STRUCTURE AT ISSUE HERE IS A POINT SOURCE UNDER SETTLED PROVISIONS OF THE CLEAN WATER ACT | 15 |
| CONCLUSION | 22 |




TABLE OF AUTHORITIES


| | Page |
|---|---|
| CASES | |
| *Amigos Bravos v. EPA*, 324 F.3d 1166 (10th Cir. 2003) | 20 |
| *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) | 10, 16 |
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| *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) | 19 |
| *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) | 3, 10 |
| *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003) | 21 |
| *Comm. to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994) | 20 |
| *Community Ass'n for Restoration of the Environment (CARE) v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129 (E.D. Wash. 1999) | 20 |
| *Environmental Defense Center v. EPA*, 319 F.3d 398 (9th Cir. 2003) | 18 |
| *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) | 11 |
| *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) | 9 |
| *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) | 10 |
| *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) | 15 |

TABLE OF AUTHORITIES – Continued

Page

*Miccosukee Tribe of Indians v. South Florida Water Mgmt. Dist.*, 1999 WL 33494862 (S.D. Fla. 1999) ..... 5

*Miccosukee Tribe of Indians of Florida v. United States*, 980 F. Supp. 448 (S.D. Fla. 1997) .....3, 4, 5

*Milwaukee v. Illinois*, 451 U.S. 304 (1981).....10, 12

*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)..... 2

*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).....15

*Missouri v. Illinois*, 200 U.S. 496 (1906) .....11

*Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) ..... 3

*National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).....19

*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).....15

*Northern Plains Resource Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied*, ___ U.S. ___, 72 USLW 3148 (Oct. 20, 2003) .....21

*Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).....15

*Reynolds v. Rick's Mushroom Service, Inc.*, 246 F. Supp. 2d 449 (E.D. Pa. 2003).....20

*Seminole Nation v. United States*, 316 U.S. 286 (1942).....14

*United States Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 257 F. Supp. 2d 407 (D. Me. 2003) .....20



TABLE OF AUTHORITIES – Continued

Page

*United States v. South Florida Water Mgmt. Dist.*, Case No. 88-1886 (S.D. Fla. 1988) ..... 5

*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979)..... 2

*Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) .....16

*Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001)..... 3

STATUTES

25 U.S.C. § 1742(6) ..... 4

25 U.S.C. § 1742(8) ..... 4

25 U.S.C. § 1750a(7) ..... 4

25 U.S.C. § 1750d..... 4

33 U.S.C. § 1341.....10

33 U.S.C. § 1342.....10

33 U.S.C. § 1342(p)(2)(E) .....17

33 U.S.C. § 1362(6) .....18

33 U.S.C. § 1362(12)(A).....18

33 U.S.C. § 1362(14) .....16

33 U.S.C. § 1377(e).....3, 11

Miccosukee Reserved Area Act, Pub. L. No. 105-313, 112 Stat. 2964 (1998)..... 4

Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572 .....15

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGISTER AND EXECUTIVE MATERIALS

59 Fed. Reg. 7629 ..... 14

66 Fed. Reg. 29951 ..... 11

Executive Order No. 12,898 ..... 14

MISCELLANEOUS

Brief of Appellant *South Florida Water Management District, South Florida Water Mgmt. Dist. v. Miccosukee Tribe*, 280 F.3d 1364 (11th Cir. 2002) ..... 16

ROBERT D. BULLARD, DUMPING ON DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990) ..... 12

MARJORIE STONEMAN DOUGLAS, THE EVERGLADES: RIVER OF GRASS (1997) ..... 4

ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS & NATIONAL PARKS (1998) ..... 3

Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 Envtl. L. Rep. 10681 (2000) ..... 13

Richard J. Lazarus, *Fairness in Environmental Law*, 27 Envtl. L. Rep. 705 (1997) ..... 12

THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard ed. 1999) ..... 13

C. RECHTSCHAFFEN & E. GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (2002) ..... 13

WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER POLLUTION Vol. 2 (1986) ..... 17, 19, 20



TABLE OF AUTHORITIES – Continued

Page

William H. Rodgers, Jr., *The Miccosukee Indians and Environmental Law: A Confederacy of Hope*, 31 Envtl. L. Rep. 10918 (2001) ..... 6

Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 Vt. L. Rev. 567 (1999) ..... 13

BUFFALO TIGER & HARRY A. KERSEY, JR., A LIFE IN THE EVERGLADES (2002) ..... 3, 5

KIM TODD, TINKERING WITH EDEN: A NATURAL HISTORY OF EXOTICS IN AMERICA (2001) ..... 18

http://www.epa.gov/ost/standards/wqslibrary/tribes/fl_4_miccosukee.pdf (visited Nov. 10, 2003) ..... 11

## INTEREST OF AMICUS CURIAE[1]

Amici Curiae, National Tribal Environmental Council (NTEC) and National Congress of American Indians (NCAI), are organizations that represent the interests of federally recognized Indian tribes. NTEC, which was formed in 1991, is a membership organization dedicated to working with and assisting tribes in the protection and preservation of the reservation environment. NTEC's mission is to enhance each tribe's ability to protect, preserve and promote the wise management of air, land and water for the benefit of current and future generations. NTEC membership is open to federally recognized tribes throughout the United States, and currently has 178 member tribes. NCAI, which was founded in 1944, is the oldest and largest organization of tribal governments in the United States. Today, its membership includes 250 tribes from across the Nation. Its mission is to inform decision-makers about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments.

Amici's member tribes have natural resources upon which they depend for their survival, including in many cases, off-reservation hunting, fishing and gathering

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[1] Counsel for Petitioner and Counsel for Respondents both consent to the filing of the Brief of Amicus. Their letters are submitted for filing herewith. No counsel for a party authored this brief in whole or in part. No person or entity, other than Amici Curiae, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

rights, which are often necessary for subsistence.[2] Tribal resources and rights are jeopardized if point sources are free to discharge pollution, unchecked, to their detriment. Like the Miccosukee Tribe here, Amici's tribes must be able to rely on the regulation and permitting of polluting effluent discharges from point sources under the Clean Water Act's National Pollution Discharge Elimination System provision to protect their interests. As the protective scope of that provision is being challenged here, Amici have a substantial interest in this case. A further interest derives from the significant role Indian tribes play under the Clean Water Act, which was expanded by the Congress in 1987 to afford tribes "Treatment as States." 33 U.S.C. § 1377(e). This provision enables tribes to acquire permit-issuing and other authorities over activities that pollute on-reservation and that would otherwise be regulated directly by the Environmental Protection Agency.[3] Authority

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[2] *See, e.g., Minnnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

[3] The statute provides that: "The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section, but only if –

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(Continued on following page)



that may be exercised by Indian tribes includes NPDES issuance under section 402, which is the subject of this case. Twenty-seven Indian tribes have received treatment-as-state approvals – all of which have been upheld by the courts.[4] Since many tribes exercise authority pursuant to the "treatment as state" provision, and many more may do so in the future, the Court's decision as to the reach of "point source" authority is vitally important to Amici.

## STATEMENT OF FACTS

The Miccosukee Tribe is a federally recognized Indian tribe that counts the Everglades of South Florida as its homeland.[5] The Tribe and its members have numerous properties in this region, among them 189,000 acres in Water Conservation Area 3A which are held under "perpetual lease" from the State of Florida – a lease which the Tribe accepted in exchange for relinquishing all of its aboriginal title claims in Florida. *See Miccosukee Tribe of*

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(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. § 1377(e).

[4] *See, e.g., City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); *Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir. 1998); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001).

[5] *See* BUFFALO TIGER & HARRY A. KERSEY, JR., A LIFE IN THE EVERGLADES (2002) (hereinafter "2002 Tiger"). On tribal history within the park, *see* ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS & NATIONAL PARKS, ch. 6 (1998).

*Indians of Florida v. United States*, 980 F. Supp. 448, 452-53 (S.D. Fla. 1997). Within the leased area the Tribe has perpetual rights to reside, to exercise religious functions, to take and use native materials, and to engage in agricultural, hunting, fishing, and frogging activities. *Id.* at 453. Tribal members also have recognized subsistence hunting, fishing and gathering rights in both the Big Cypress National Preserve and the Everglades National Park. *See* 25 U.S.C. §§ 1742(6), (8), 1750a(7). In addition, the Tribe also has the exclusive right to use and occupy a 667-acre strip known as the Miccosukee Reserved Area on the northern edge of the Everglades National Park. *See* Miccosukee Reserved Area Act, Pub. L. No. 105-313, 112 Stat. 2964 (1998). Finally, the Federal Government holds 75,000 acres of land, known as the Miccosukee Federal Indian Reservation, in trust for the Miccosukee Tribe. Almost 50,000 acres of the Reservation are located within Water Conservation Area 3A. *See Miccosukee Tribe of Indians*, 980 F. Supp. at 452; 25 U.S.C. § 1750d.

The Everglades "begin" at Lake Okeechobee, Marjorie Stoneman Douglas wrote in 1947. MARJORIE STONEMAN DOUGLAS, THE EVERGLADES: RIVER OF GRASS 9 (1997). The "river of grass" she described was seventy miles wide and several inches deep, and it flowed circuitously north to south. Time has brought significant changes to the plumbing of the Everglades but the starting line is still Lake Okeechobee and the prominent flows are still north to south. The S-9 structure at issue here reverses the flow and back-pumps stormwater and pollutants in huge volumes (the pumping capacity of the station is



1,861,392,900 gallons in 24 hours) into Water Conservation Area 3A, the so-called "Everglades Protection Area."[6] Much of the land upon which the Tribe lives, works, and uses for religious and cultural purposes, is located within Conservation Area 3-A and is adversely affected by the discharge of pollutants from the S-9 pumping station.

As the lower court recognized, "[t]he way of life of the Tribe and its members, including their religious, cultural, economic, and historical identity, relies upon the Everglades ecosystem and upon preservation of the Everglades in its natural state." *Miccosukee Tribe of Indians v. South Florida Water Mgmt. Dist.*, 1999 WL 33494862 (S.D. Fla. 1999) *1. "Historically, islands of trees in the Leased Area have been the site of the Tribe's religious and cultural practices. The tree islands provide dry spots within the Everglades where tribal members can build traditional Indian huts known as chickees, and plant corn and other vegetables. An integral part of the Tribe's religious tradition is the spring planting of corn, accompanied by the Green Corn Dance. The tree islands also are a source of plants used in traditional tribal medicines." *Miccosukee Tribe of Indians*, 980 F. Supp. at 453.

This case is one of several chapters in the effort by the Miccosukee and others to protect the flora and fauna of the Everglades from pollution. In 1988, the United States filed *United States v. South Florida Water Mgmt. Dist.*, Case No. 88-1886 (S.D. Fla. 1988), based on the theory that state-sanctioned nutrient pollution in the Everglades Agricultural Area, just south of Lake Okeechobee, exacted

[6] 2002 Tiger, *supra* note 5, at 153-54.

a heavy ecological price on federal holdings further south, including the Miccosukee territory. The Miccosukee Tribe intervened in this case in 1992, and has maintained a vigorous and effective presence ever since. *See* William H. Rodgers, Jr., *The Miccosukee Indians and Environmental Law: A Confederacy of Hope*, 31 Envtl. L. Rep. 10918 (2001) (describing the litigation).

## SUMMARY OF ARGUMENT

The Miccosukee Tribe brought suit against the South Florida Management District here simply to enforce a valid federal permitting scheme. The Tribe asserts that the S-9 pumping station, which indisputably pumps pollutants into the Everglades, is a point source that must obtain a National Pollution Discharge Elimination System (NPDES) permit. The Tribe does not ask for special favors to preserve its unique, vulnerable, and historic properties. It asks only for a fair chance to bring these "point source" laws of general applicability to bear on its current exigencies.

NPDES permitting is particularly appropriate in this case. As a national, federal permitting scheme it is particularly suited to balance and protect the competing sovereign interests at stake here. As in cases of interstate water pollution, the NPDES permitting process is the appropriate place to account for the negative impact the State's action is having on the Miccosukee Tribe, a separate sovereign entity. For instance, just as federal permitting would take into account any other affected states' standards in a similar situation, it can likewise take into account the Tribe's water quality standards. This Court



has confirmed that regulation of interstate water pollution has always been a matter of federal law. The NPDES permitting scheme merely formalizes what has always been within the ambit of federal regulatory powers.

In addition, as a national, federal scheme, the NPDES permitting process is best suited to address the issues of environmental justice and protection of tribal trust assets that are present here. Environmental protection at a national level, such as that available under the Clean Water Act's NPDES permitting scheme, can help ensure that the Miccosukee Tribe does not bear a disproportionate share of the "costs" involved here. As it stands now, without permitting, the Tribe is certainly bearing the brunt of those costs. While the District may be saving time and money by not obtaining a permit, the Tribe is suffering the utter degradation of its homeland. Clearly, state regulation is insufficient to protect the Tribe's interests in this regard as the State is unlikely to make decisions that would raise its own costs. State regulation is likewise insufficient as the State does not have the same fiduciary responsibility to protect the Tribe's trust assets that the Federal Government does. All of these considerations are consistent with the plain meaning of the Act.

The S-9 structure at issue here is a "point source" requiring a permit under the most mundane interpretations of the Clean Water Act. The District is the responsible owner and manager of this facility, controls its destiny, and is in the best position to improve its 1957-vintage performance. None deny that the C-11 canal and its S-9 back-pump outlet releases substantial pollutants in huge volumes into the pristine waters of the Everglades that is the legally protected home of the Miccosukee Indian Tribe. None deny that the waters pumped through the S-9

structure affect adversely the receiving waters, Indian interests, and the Everglades National Park. *See* J. App. 150, 167-69.

Arguments to the contrary are out of touch with the basic structure of the Clean Water Act. The District's claim that the Act excuses pollutants that "are merely passed through", *see* Pet'r Br. at 26-27, is repudiated by the universal experience of publicly-owned treatment works (POTWs). POTWs deal daily with the burden of treating, managing, and controlling pollutants that enter their systems, sometimes willy-nilly, from "indirect dischargers," both known and unknown. The United States as Amicus proposes to excuse transfers of polluted navigable waters "from one location to another." U.S. Amicus Br. at 13. It offers this rash – and potentially destructive – interpretation without a single word attempting to reconcile its reading with the strict statutory definitions of "pollutant" and "point source" that plainly reach activities that are dwarfed by the extravagant S-9 arrangement defended here.



## ARGUMENT

### I. THE INTRODUCTION OF POLLUTED WATERS BY ONE SOVEREIGN INTO THE WATERS OF ANOTHER SOVEREIGN IS PROPERLY THE SUBJECT OF FEDERAL REGULATION UNDER THE CLEAN WATER ACT AND THUS NPDES PERMITTING IS NECESSARY AND APPROPRIATE HERE AS THE DISCHARGE OF POLLUTANTS BY FLORIDA ADVERSELY AFFECTS INDIAN RIGHTS AND PROPERTY

The South Florida Water Management District (District) and several of its Amici argue that requiring a National Pollution Discharge Elimination System (NPDES) permit in the present situation would in some way upset the balance of federal-state power over water pollution regulation. They argue that the situation here is one concerning "water management and allocation" and that such a situation is one traditionally left to state control. Pet'r Br. at 35. Quite the contrary is true. While indeed, the Clean Water Act (CWA) envisions a partnership between the State and the Federal Government, the situation here is precisely the type that is meant to be addressed by federal regulation.

Here, the discharge of pollutants by a governmental entity of the State of Florida adversely is affecting the rights and property of another sovereign entity, the Miccosukee Tribe. Inter-governmental pollution such as this is traditionally regulated by the Federal Government, a fact that is reaffirmed by the CWA.

Congress has broad powers to regulate "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Min. and Reclamation Ass'n,*

*Inc.*, 452 U.S. 264, 282 (1981). In the case of water pollution, the Court has repeatedly recognized that regulation of interstate water pollution is "primarily a matter of federal law." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). This primacy of the federal government in the regulation of interstate water pollution was solidified in the 1972 amendments to the Federal Water Pollution Control Act and the creation of the NPDES, a federal permitting program. *Milwaukee v. Illinois*, 451 U.S. 304, 310-11 (1981).

The NPDES permitting program covers situations where effluent discharges from one state negatively impact another state. In such situations:

> the CWA carefully defines the role of both the source and affected states, and specifically provides for a process whereby their interests will be considered and balanced by the source state and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution.

*Ouellette*, 479 U.S. at 497. One way for the federal government to take the interests of an affected state into consideration is to take the affected state's water quality standards into consideration and to condition issuance of NPDES permits on compliance with such water quality standards. *Arkansas*, 503 U.S. at 105-107. The same is true for water quality standards set by an Indian tribe. *City of Albuquerque v. Browner*, 97 F.3d 415, 423-24 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (holding that 33 U.S.C. §§ 1341 and 1342 of the Clean Water Act give



the "EPA the authority to issue NPDES permits in compliance with a tribe's water quality standards"). The Clean Water Act also directs the EPA Administrator to "consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water." 33 U.S.C. § 1377(e).

Since the pollution discharges in this case by an agent of the state of Florida are affecting the interests of another sovereign, the Miccosukee Tribe, the situation is analogous to interstate water pollution. Indeed, the analogy is particularly apt here, as the Tribe is recognized as a "State" under the Clean Water Act. *See* 33 U.S.C. § 1377(e).[7]

The gross water pollution descending the C-11 canal and pouring through the S-9 pumping structure is regrettably suggestive of the cross-boundary delivery of sulfur oxides in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), the downstream release of sewage in *Missouri v. Illinois*, 200 U.S. 496 (1906), and the cross-lake flow of

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[7] The Clean Water Act authorizes the EPA Administrator to treat tribes as states for purposes of the Act. Significantly, such treatment affords tribes the ability to set water quality standards, and hence to regulate their waters, in the same manner as states. Here, the Miccosukee Tribe has enacted such water quality standards. Miccosukee Environmental Protection Code Subtitle B: Water Quality Standards for Surface Waters of the Miccosukee Tribe of Indians of Florida http://www.epa.gov/ost/standards/wqslibrary/tribes/fl_4_miccosukee.pdf (visited Nov. 10, 2003); 66 Fed. Reg. 29951 (listing Miccosukee Water Quality Standards as approved by the Environmental Protection Agency).

effluent in *Milwaukee v. Illinois*, 451 U.S. 304 (1981). When this Court saw fit to preempt the interstate common law of nuisance with the comprehensive Clean Water Act in *Milwaukee v. Illinois*, it was not envisaging "opt-outs" of the dimensions attempted by the District here. As NPDES permitting is the appropriate tool for states to rely on where they are being affected by another state's pollution discharges, so too is it the appropriate tool in this situation.

## II. CONSIDERATIONS OF ENVIRONMENTAL JUSTICE REINFORCE THE CONCLUSION THAT THE NPDES PERMIT PROVISIONS SHOULD BE APPLIED TO PROTECT TRIBAL LANDS

The environmental justice movement had its origins in 1982 in one of North Carolina's poorest counties "when local officials decided to locate a PCB landfill in a predominately African-American neighborhood." R.V. Percival, et al., Environmental Regulation: Law, Science, and Policy 446 (2d ed. 1996); *See* Richard J. Lazarus, *Fairness in Environmental Law*, 27 Envtl. L. Rep. 705 (1997); ROBERT D. BULLARD, DUMPING ON DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990). At a minimum, environmental justice has come to mean:

> The fair treatment of people of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no population should be forced to shoulder a disproportionate share of exposure to negative effects of pollution due to lack of political or economic strength.



Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 Envtl. L. Rep. 10681 (2000) (quoting the "standard definition" developed in 1998 by EPA's Office of Environmental Justice), quoted in C. RECHTSCHAFFEN & E. GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 6, 7 (2002).

Environmental Justice considerations have a special force in Indian country. *See* Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 Vt. L. Rev. 567 (1999). As articulated by Professor Judith Royster:

> Indian tribes connect to their lands not only on economic and emotional levels, but also on the levels of culture, religion, and sovereignty. Environmental degradation may, for example, affect land that is sacred to tribes, or pose a threat to the entire territory in which the tribe as government operates. And for Native American tribes, land is not fungible. Most tribes today occupy reservations carved out of their aboriginal territory, lands that the tribes occupied before white contact. The reservations are 'place': a homeland, a source of physical subsistence and spiritual sustenance. The loss of place may impact the identity and destiny of the tribe itself.

THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 157-58 (Michael B. Gerrard ed. 1999).

Here, the Miccosukee Tribe is being disproportionately burdened by the discharge of pollutants into its homeland. While S-9 is clearly protecting the people who live along Florida's lower east coast from flooding, and is ensuring

them a stable water supply, *see* Pet. Br. at 12, it is decimating the homeland and cultural existence of the Miccosukee Tribe. While, as several of the District's Amici allege, enforcing the permitting scheme here would entail certain expense, the enormous cost currently being suffered by the Tribe cannot be overlooked. Under the NPDES permitting scheme, principles of environmental justice can be taken into consideration. In fact, as declared by Executive Order, these principles must be taken into consideration by the Federal Government. Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (1994). The Executive Order states:

> To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States . . .

59 Fed. Reg. 7629.

Permitting under the federal NPDES scheme would also appropriately take into consideration the impacts on the tribal trust assets implicated here. Under the federal trust responsibility the United States and its officers are expected to meet exacting fiduciary standards in carrying out responsibilities affecting Indian tribes and treaty rights. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The interests being threatened here, including the threat to the Miccosukee Tribe's homeland, sovereignty, economic integrity, resources, and its right to



conduct its religious and cultural practices, are precisely the interests the United States is duty-bound to protect. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). In the Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572, Congress demonstrated its awareness of the importance of tribal interests in the Everglades when it provided that in exercising federal authority the Secretary of the Interior shall "fulfill his obligations to the Indian tribes in South Florida under the Indian trust doctrine as well as other legal obligations." *Id.* § 601(h)(2)(C). *See also Blue Legs v. United States*, 867 F.2d 1094, 1100, 1101 (8th Cir. 1989) (federal government's duty to the tribe under environmental statutes "is buttressed by the existence of the general trust relationship" and that "Congress intended that the obligations of BIA and IHS under the RCRA to be exercised consistent with their trust obligation.").

Environmental justice and trust considerations are consistent with the plain reading of the Clean Water Act's point source provisions. A contrary reading allows the District to treat the area of the Everglades most critical to the Miccosukee Tribe as a filter for polluted waters discharged by the S-9 pump.

## III. THE S-9 STRUCTURE AT ISSUE HERE IS A POINT SOURCE UNDER SETTLED PROVISIONS OF THE CLEAN WATER ACT

Congress' definition of a "point source," powerful in its simplicity, is "any pipe, ditch, channel, tunnel, . . . from

which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The S-9 structure so obviously features "pipes," "ditches," "channels," and "tunnels" from which "pollutants" are liberally spewed that feats of imaginative interpretation would be required to exclude it from this definition. This is not a case of a far-fetched interpretation of point source. As this Court has held, the definition of point source already includes U.S. naval warplanes dropping ordinance in the waters of Puerto Rico, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and a sewage treatment plant fed by storm sewers and featuring system "overflow" points known as combined sewer overflows (CSOs), *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

The S-9 pump is a "point source" with structure, purpose, and function so plainly within the Congressional design that the District *conceded* that S-9 was a statutory "point source."[8] Despite this concession, the District attempts to avoid the point source characterization by arguing that it is not a conveyance "from which pollutants are or may be discharged," in order to escape the requirement of obtaining an NPDES permit for S-9. The District insists that a "discharge" occurs "when the pollutant originates from the point source, not when the pollutants are merely passed through." Pet'r Br. at 26-27. The United

[8] *See* Brief of Appellant South Florida Water Management District at 8, *South Florida Water Mgmt. Dist. v. Miccosukee Tribe*, 280 F.3d 1364 (11th Cir. 2002) (No. 00-15703-CC), which states :

> There is no dispute that the S-9 pumping station is a 'point source,' that the waters passing through it contain low levels of pollutants, and that those waters constitute navigable waters for purposes of the CWA.



States as Amicus Curiae repeats the District's error.[9] The United States argues that the S-9 structure "merely conveys" pollutants, and hence, claims that there is no "addition." *See* U.S. Amicus Br. at 10, 12. It argues that the pumping station "merely transports [polluted] navigable waters from one location to another." *Id.* at 13. These arguments are unavailing and unworkable.

First, the definition of point source clearly includes structures that merely convey – i.e. "any discernible, confined, and discrete conveyance." 33 U.S.C. § 1362(14). For example, storm sewers, which the S-9 facility very closely resembles, and which are customarily point sources, merely "convey."[10] Indeed, the whole panoply of

[9] In its Amicus brief, the United States states the Question Presented as follows:

> "Whether petitioner's longstanding practice of pumping accumulated water from a water collection canal to a water conservation area within the Florida Everglades constitutes an addition of a pollutant from a point source for purposes of Section 402 of the Clean Water Act, 33 U.S.C. § 1342, where the water contains a pollutant, but the pumping station itself adds no pollutants to the water being pumped." U.S. Amicus Br. at 1.

[10] The S-9 structure at issue here compares most closely to a storm sewer. A storm sewer is a conveyance for conducting pollutants from roads, construction sites, and farms into the navigable waters. The storm sewer is a classical point source. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER POLLUTION Vol. 2 § 4.10 at 157-62 (1986). *See also* 33 U.S.C. § 1342 (p)(2)(E) (stating that while permits are generally not required for discharges "composed entirely" of stormwater, they are required for discharges that violate water quality standards, or are significant contributors of pollutants to waters of the United States; both conditions are satisfied here). As a result of the Water Quality Act of 1987 and a 13-years-in-the-making "Phase 2" storm water rule, all discharges from small municipal storm sewer systems and from 1- to 5-acre construction sites are now within the NPDES permit program. For background,

(Continued on following page)

run-of-the-mill point sources (trucks, helicopters, earth-moving equipment, etc.) are merely pass-through devices that do not physically generate the pollutants they carry to the water. The definition of point source also includes the clause "from which pollutants are or may be discharged." A discharge means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).

Exempting point sources under a "pass through" theory would violate the plain language of the Act. It would remove already polluted water from the category of "pollutant," a result which the Act does not contemplate. 33 U.S.C. § 1362(6) (defining "pollutant"). Such a result would excuse transfers of polluted waters from point A to point B where biological effects can be magnified many times. It would close the door on NPDES applications to water movements – uncontrolled ballast comes to mind – that is the source of the spread of exotic species and considerable ecological damage throughout the United States, including the Everglades.[11] It would make all the special corners and pockets and treasures of U.S. waters vulnerable to a creeping, degraded sameness if foul water is brought in from somewhere else.

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*see Environmental Defense Center v. EPA*, 319 F.3d 398, 405 (9th Cir. 2003) (emphasizing that the "foremost cause" of impaired ocean waters is urban runoff; upholding stormwater rules). The only functional difference between the S-9 structure and the hundreds of small municipal storm sewers is the enormous size and volume of the S-9 structure.

[11] An exotic is a nonindigenous species. *See* KIM TODD, TINKERING WITH EDEN: A NATURAL HISTORY OF EXOTICS IN AMERICA (2001).



Petitioners, and the United States as Amicus, incorrectly characterize this case as a water transfer case similar to *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). This is not a water supply case where drinking water is whisked about within one or more systems. This is not drinking water with trace pollutants; it is disposal water with gross pollutants. It is a pollution disposal case. The South Florida Water Management District directs a river of pollution (with flows up to 950 cfs) onto public and Indian properties of unique ecological value. The situation is also unlike that in *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), which explores whether dams are point sources. The status of dams as point sources is not presented by this case. Typically, a dam is a passive structure that interdicts flows with consequent biological effects. The S-9 structure is not a dam but a pump. It is not passive but active. It does not block water but moves it.

The Eleventh Circuit correctly stressed that "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." 280 F.3d at 1368; *See also* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER POLLUTION, Vol. 2, § 4.10 at 158 (1986) hereinafter Rodgers (stating that, "The statutory condition that a pollutant be 'added' to the stream is met if the source is the cause of the appearance of the pollutant regardless of the mechanism"). The S-9 structure is a back-pumping operation. Energy is applied to move this water – and the pollutants within it – into the backyard of the Miccosukee Indian Tribe. The District operates this pumping station and the discharges of pollutants from it. The "pollution" from this activity occurs

on its watch and within its jurisdiction. The District's assertion that S-9 is a mere conduit, an inanimate part of the piping, a stoic victim of problems from somewhere else and responsible for none of them, smacks of blaming the pump for human action and must be rejected.

In addition to the plain language of the Clean Water Act, other factors indicate S-9 is a point source subject to NPDES permitting. The ample case law exploring the contours of "point source" in the lower federal courts, indicate that a test of "controllability" best explains the distinction between "point sources" that need NPDES permits and nonpoint sources that do not. *See* Rodgers at 150-62. Here, the District is the responsible owner and manager of the S-9 structure, a situation found determinative for owners of other point source structures subject to NPDES permitting. *See, e.g.*, the owner of the dairy farm with its waste storage ponds, spray guns, and trucks in *Community Ass'n for Restoration of the Environment (CARE) v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129 (E.D. Wash. 1999), the owner of the waste rock piles at the molybdenum mine in *Amigos Bravos v. EPA*, 324 F.3d 1166 (10th Cir. 2003), the owner of the storage bin with "spent mushroom substrate" releasing a "black oil-like" leachate into the water in *Reynolds v. Rick's Mushroom Service, Inc.*, 246 F. Supp. 2d 449 (E.D. Pa. 2003), the owner of the abandoned mine (with ditches, pipes, channels, and gullies) in *Comm. to Save Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994), the owner of the net pen salmon farms in *United States Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 257 F. Supp. 2d 407 (D. Me. 2003) (escaping "non-North American strains of Atlantic salmon" are the "pollutants"), the owner of the



groundwater pumps that release their "salty" byproduct into the Tongue River in *Northern Plains Resource Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied*, ___ U.S. ___, 72 USLW 3148 (Oct. 20, 2003), and the owner of the chicken farms whose pollution wended its way into the drinking water of the City of Tulsa. *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003). Like with these examples, the District here has an active and affirmative hand in directing the delivery of pollutants into the Everglades and into the "Indian country" protected there. The South Florida Water Management District, like the owners in the cited examples, must obtain an NPDES permit to operate S-9.

## CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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